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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1958

17 I.A. 2d 278

Term No. 57-0-12 Agenda No. 7

GLORIA S. LORTS, ROGER O. LORTS, ROGER O. LORTS, Administrator of the Estate of Mark Gregory Lorts, Deceased, LESTER C. SCOTT, Administrator of the Estate of Eldon Kelly Scott, Deceased,	)	Appeal from the Circuit Court of Madison County.
Plaintiffs-Appellants,	)	
vs.	)	
LOREN McDONALD,	)	
Defendant-Appellee.	)	

CULBERTSON, P.J.

This is an appeal from a judgment entered in the Circuit Court of Madison County upon the verdicts of a jury finding defendant not guilty in four cases arising out of the same accident. The actions were instituted, first, for personal injuries, brought by GLORIA S. LORTS, driver of an automobile involved in the collision; second, for property damage to the vehicle by her husband, the owner of the car she was driving; third, for the wrongful death or Mark Gregory

Lorts, infant son of Gloria Lorts and her husband, brought by the husband as administrator of the estate; and, fourth, for the wrongful death of Eldon Kelly Scott, brother of Gloria Lorts, brought by LESTER C. SCOTT, his father, as administrator of his estate.

The collision of the two vehicles, one driven by defendant, LOREN McDONALD, and the other by plaintiff, GLORIA S. LORTS, apparently occurred in the northbound traffic lane which was the proper right-hand lane for defendant's car to be in at the time of the accident. The plaintiff's vehicle left the west lane where it was traveling and was at right angles to the roadway, obstructing the lane in which defendant was traveling. The testimony of the plaintiff, Gloria Lorts, was to the effect that as she approached a culvert, southbound from the north, she last saw defendant's vehicle approaching from the south, not yet upon the culvert She stated that it was traveling over the middle of the road. At that time she pulled off onto the right shoulder and applied her brakes and this was the last she recollected until after the collision when her car was at right angles to the direction in which she had been traveling and on the opposite side of the roadway She denied that she turned her car to the left, and was unable to offer any explanation of how her automobile

got into the position where the collision occurred.

On appeal in this Court the only errors assigned are in the giving of certain instructions on behalf of defendant. It is also contended that the verdicts of the jury are against the manifest weight of the evidence, but a careful examination of the record shows that there is no basis for such contention.

At the close of the evidence the Court conferred with counsel on the instructions and received their specific objections. At the conclusion of the conference Counsel for plaintiffs stated, "We have no other objections," and the Court directed that the record show that there were no other objections. In the Motion for New Trial plaintiffs asserted the Court erred in giving to the jury defendant's instructions numbers 3, 7, 8, and 9, and stated that such instructions "incorrectly stated the law and are misleading, and the giving of these instructions prejudiced the plaintiffs." Certain specific objections made on appeal in this Court were not made at the pre-argument conference at the conclusion of the evidence and same are not considered. It is primarily contended on appeal by plaintiffs that defendant's given instructions either submitted improper issues to the jury or failed to designate adequately the causes of action "among the respective

plaintiffs, " to which they were to be applied.

We have frequently stated that the function of instructions is to advise the jury of the pertinent law in language appropriate for its immediate application to the case, and the test is not what meaning counsel can at leisure attribute to them but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions considered as a series (REIVITZ vs. CHICAGO RAPID TRANSIT CO., 327 Ill. 207, 213).

We also consider the fact that this cause has been tried twice and submitted to two juries. The first jury was unable to agree, and the subsequent jury, in the present cause, found the defendant not guilty.

In one instruction there was an attempt to define the three issues required to be proven by plaintiff in every negligence action, and that is, plaintiff's freedom from contributory negligence; defendant's negligence, actionable as charged; and that defendant's negligence proximately caused plaintiff's injuries. It is argued by plaintiffs on appeal that requiring proof of due care as to the four separate plaintiffs requires explanation of the burden; that no two plaintiffs had exactly the same burden; and that to attempt to define the burden in a single paragraph would serve to confuse

because the jury did not know to which plaintiff or to which count the rule applied. Counsel for defendant replies that if an instruction of similar import was given as to each specific case an objection might be made that the issue was over-emphasized as a result of its repetition in application to the four different cases.

While there were four separate plaintiffs there were but two classes of plaintiffs, two individuals and two administrator plaintiffs. The rule as to defendant's care required as to each of the classes of plaintiffs is stated in separate sentences in the first paragraph of the instruction. One is designed to apply to administrator plaintiffs, and the other to individual plaintiffs.

It is also contended that the present instruction is erroneous because it presented the issue of contributory negligence to the jury when there was no evidence to support a finding as to certain plaintiffs. Defendant points out, however, that the administrator's action for the wrongful death of the brother of Gloria Lorts, which was for the benefit of his parents as next of kin, would require consideration of the fact that the daughter, Gloria Lorts, and her husband, resided in the home of the parents, and Gloria was the only adult in charge of the household able to discharge parental duties on the morn-

ing of the occurrence. Earlier in the day of the accident she had driven her husband and her mother to work, and had taken her younger sister to school. This was the discharge of a duty imposed upon the parents in the transportation of the younger daughter to and from school. In theory, when Gloria undertook to perform this duty for them while they were away at work, she was acting as their agent, and any negligence in her conduct would be imputable to them under the decisions of the Courts of this State (O'HARAN vs. LEINER, 306 Ill. App. 230, 233; GRAHAM vs. PAGE, 300 Ill. 40, 43). The record therefore shows that the agent of the plaintiff administrator may have been guilty of negligence and that such agent's negligence would support a charge that the principal was negligent RICH vs. ALBRECHT, 300 Ill. App. 493, 497). As to the other administrator's action, Gloria Lorts, the driver, was one of the next of kin, With respect to the claim of Roger Lorts, there was a special defense raised that Gloria was an inexperienced and incompetent driver and that that fact was known to her husband and that he was negligent in permitting her to drive his car under such circumstances.

Another contention made is that the instruction is erroneous as to a plaintiff adminis-

trator's burden of proving that some one of the persons for whom he sues was free of contributory negligence. Other instructions define the administrator's action for next of kin and the measure of damages to be applied. Each plaintiff administrator proved the identity of his decedent's next of kin, and it is difficult to understand how the jury would be confused as to the next of kin in each case, since such identity was established by direct evidence.

The case of NUDD vs. MATSOUKAS, 7 Ill. 2d 608, is discussed by the litigants as supporting the contentions of the respective parties in construction of the law and instruction under consideration. In the NUDD case the principle was established that an administrator's cause of action for pecuniary loss resulting to non-negligent next of kin sustaining pecuniary loss by reason of the wrongful death of a decedent would not be barred because of contributory negligence of a negligent next of kin. In that opinion the Court said (at page 614), "We regard the public policy of this State to require no more than that the person guilty of contributing to his own injuries shall not recover." If the only next of kin sustaining pecuniary loss is guilty of negligence contributing to the death, the administrator has no action on his behalf. It therefore follows that an administrator, to maintain an action to recover for pecuniary loss to the next of kin in a wrongful death action must both allege and prove that there is next of kin entitled to recovery. The instruction presumably was designed to outline such requirement of proof as

to an administrator's action, and this conclusion is reinforced by the allegations of the complaint in which each administrator alleges the existence of the decedent's next of kin, and that all of them were in the exercise of defendant's care and caution for decedent's safety at all times mentioned in the count.

There is further objection made to the instruction on the ground that it limits the jury's determination of defendant's negligence to a statutory violation of the motor vehicle act. Plaintiffs offered three instructions which referred to the statutory regulations of an automobile driver's conduct under the Act, including the speed prohibitions. No other instructions were tendered by plaintiffs informing the jury of the negligence charged to the defendant by plaintiff's complaint. It appears that plaintiffs had elected to limit the issue of defendant's negligence to such statutory violations, and they cannot now, on appeal, complain that defendant's instruction is similarly limited. Another criticism leveled at the instruction is that it requires not only proof that defendant violated some statutory regulation of automobile operation, but also requires proof that a reasonably prudent person could have foreseen that an injury would likely ensue. While not parallel in its facts, this principle was commented on in NEY vs. YELLOW

CAB CO., 2 Ill. 2d 74.

The last paragraph of the instruction is objected to because the jury was required to find that defendant's negligence was the proximate or immediate or real cause of the action rather than a proximate cause. While we cannot, as a matter of principle, approve language of this type seeking to interpret proximate cause, under the facts in the record we do not believe that it constituted reversible error.

Another instruction was objected to on the ground that it was repetitious but a reading of such instruction indicates that it was not in fact repetitious, but instructed on an alternative theory.

We have recited some of the points which were raised by the parties, not as a general approval of the form of instruction given, but for the purpose of considering the impact of such instructions on the jury, in the case before us and for the purpose of clarifying the issues apparently raised by such instructions. The abstract of record which contains the statements of counsel with respect to objections to instructions did not embrace other objections which are now being raised on appeal (CITY OF WAUKEGAN vs. STANCZAK, 6 Ill. 2d 594, 608). The motion for new trial did not specify such errors and as a consequence, in view of the fact that the case has been tried twice and that the only

issues now presented on appeal arise from contentions asserted as to such instructions, the giving of such instructions should not, under the evidence in the record, be deemed to be reversible error.

This cause will, accordingly, be affirmed.

Judgment affirmed.

Bardens and Scheineman, JJ., concur.

Publish Abstract only.

47225

IN THE MATTER OF THE ESTATE OF MATTIE PENN SHAW, Deceased,

WILLIAM T. PRIDMORE and RUBY JOHNSON BENNETT,

Appellants,

v.

DAVID POTTISHMANN, Administrator de bonis non of the Estate of MATTIE PENN SHAW, Deceased,

Appellee.

17 I.A. 2d 279

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

On March 1, 1956, the Probate Court of Cook County entered an order "In the Matter of the Estate of Mattie Penn Shaw, Deceased," as follows:

> "On motion to determine and order payment of Attorney's fees and Administrator De Bonis Non fee and to determine the status of a certain contract to purchase real estate commonly known as 1454 South Union Avenue;
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> "It Is Hereby Ordered that the Administrator De Bonis Non pay over to Attorney Victor Potysman the sum of $175.00 as and for his attorney's fees, and pay unto himself the sum of $64.35 as and for his Administrator's fees, and further that the status of the said contract is Realty.
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> "It Is Further Ordered that attorney's fees for William Pridmore of $100.00 and Administrator's fees for Ruby J. Bennett of $86.75 shall stand as liens against said Real Estate."

From this order an appeal was taken to the Circuit court of Cook county and in due course the matter came on for hearing. At that time the court properly inquired of the attorneys present what the issues were. The colloquy that followed

is confusing. The court then entered an order that attorney's fees in the sum of $175 be allowed to the attorney for the administrator de bonis non and that the administrator de bonis non be allowed fees of $64.35, the same as allowed by the Probate court. The court further ordered that the status of the interest of deceased in a contract to purchase real estate was and is an interest in real estate, descending to the heirs of the deceased. Thereupon the court remanded the matter to the Probate court of Cook county with directions to enter the orders set forth.

As to the fees allowed by the Circuit court, appellant Pridmore appears to have declared that he could not object to them, but he now states he meant that if they were proved up de novo, he would not object to them. He also objected to the fact that his attorney's fees and the administrator's fees allowed by the Probate court are made to stand as liens against the real estate, instead of being paid out of funds in the estate as the other fees were.

On an appeal from the Probate court trial in the Circuit court is de novo. In re Estate of Schwartz, 286 Ill. App. 310, 315; Marer v. Estate of Wolford, 273 Ill. App. 305, 318; Cairo Meal & Cake Co. v. Estate of Brigham, 268 Ill. App. 510; Estate of Johnson v. Kilpatrick, 250 Ill. App. 416; Elder v. Whittemore, 51 Ill. App. 662. A jury was demanded, which counsel refused to waive. He argues that the reasonableness of the attorney's fees and the manner of their payment

were then to be tried as a new matter. The statute appears to be very clear on this, and while there seems to be no serious litigation involved, the court was required to call a jury and proceed de novo, hearing the evidence with respect to attorneys' services and any other matters involved in the appeal. Here, the rules with respect to the submission of the case to the jury would be applicable and the court, of course, has the power under proper circumstances to direct a verdict at the conclusion of plaintiffs' case, but until then it is bound to proceed as if this were the ordinary jury trial. The need for reversal and remandment is therefore inescapable.

A large portion of the record and much of the abstract are wholly unnecessary for the purposes of this review. The costs will be divided equally between the parties.

The judgment is reversed and the cause is remanded with directions to the court to set aside the order appealed from and to hear the case de novo.

Judgment reversed and cause remanded with directions.

McCormick and Robson, JJ., concur.

Abstract only.

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47253

17 I.A. 280

JOSEPH M. MORAN, et al., Appellants,	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	)	
ZONING BOARD OF APPEALS OF THE CITY OF CHICAGO, et al., Appellees.	)	

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

The North West Federal Savings and Loan Association, a defendant herein, whose principal place of business is 4911 Irving Park road, Chicago, Illinois, made application to construct and maintain a parking lot at 4901-11 West Dakin street, in Chicago, Illinois, being the southwest corner of West Dakin street and North Lamon avenue. The purpose was to use the premises for parking private passenger automobiles for its customers and employees. The Commissioner of Buildings refused the permit, and the applicant appealed his decision to the Zoning Board of Appeals of the City of Chicago, which sent notices of hearing to certain property owners in the vicinity. On October 18, 1955 a hearing was had before the Zoning Board of Appeals at which 32 objectors, who are now plaintiffs, were present. The board heard evidence and entered an order finding that the proposed use was necessary for public convenience and ordered the permit to be issued providing certain conditions set out in the order were complied with.

The plaintiffs filed a complaint, which was later amended, in the Superior Court of Cook County under the Administrative Review Act to review the decision of the Zoning Board of Appeals. An answer was filed by the Zoning Board of Appeals which, among other

things,included a complete transcript of the hearing before the Zoning Board of Appeals. After hearing, on June 14, 1956 the court affirmed the decision of the Zoning Board. The plaintiffs take an appeal from that judgment. The appeal was first taken directly to the Supreme Court of Illinois, which on motion transferred it here.

In order to prevail here the plaintiffs must establish that they have sufficient interest to entitle them to maintain the action, and also that the finding and decision of the Zoning Board of Appeals were contrary to the specific provisions of the zoning ordinance or that the finding and decision were against the manifest weight of the evidence.

The complaint as filed set forth that the plaintiffs were all residents and property owners residing not more than two city blocks from the area of the proposed parking lot and that their property would be diminished in value and they would suffer pecuniary loss, inconvenience and hardship as the result of the decision of the Zoning Board of Appeals. The amended complaint also sets forth that the property in the area in question was zoned for duplex residence use and that the plaintiffs are not permitted to use their land for parking lots.

At the hearing three witnesses testified on behalf of the plaintiffs. Their testimony was in substance that the objections to the parking lot were signed by 55 property owners living in the vicinity; that the parking lot would destroy the residential aspect of the neighborhood and would make their property less desirable for residential purposes; that it would not contribute to the safety and security of a residential area; and that the applicant

had access to property in an adjacent area that was zoned for business and commercial use and which could be used for parking lots.

In support of its contention that the plaintiffs have not shown sufficient interest to maintain the action, the defendants cite and rely on 222 E. Chestnut St. Corp. v. Bd. of Appeals, 10 Ill.2d 132, in which case the plaintiff objected to the decision of the Zoning Board of Appeals permitting a variation in the setback from the lot line of a proposed 23-story apartment building with attached garage. The plaintiff alleged that the granting of the variation would substantially injure plaintiff's property in that its light, air and fire protection would be interfered with, that its taxable value would be diminished, and traffic congestion would be increased near and in front of it. These allegations were denied by the defendant. No evidence was introduced to substantiate the allegations. The court held that the plaintiff did not have a sufficient interest to maintain the action, and says:

> "The fact that the zoning statute purports to confer upon qualified owners a right to bring suit for violation does not answer the question presented here, however, which concerns the propriety of granting a variation rather than mere enforcement. We have heretofore held that the right to review a final administrative decision is limited to those parties of record in the proceeding before the administrative agency 'whose rights, privileges, or duties are affected by the decision.' (Winston v. Zoning Board of Appeals, 407 Ill. 588.) In that case a variance had been granted for construction of a 40-unit apartment building on certain property classified in a 'B' country home district of Peoria County. A complaint, filed under the Administrative Review Act by other property owners who were parties of record before the zoning board, alleged that they owned property in the vicinity of the premises involved and that the value and use of their property were affected by the granting of the variance. In affirming a judgment dismissing the complaint, this court held that to state a cause of action specific facts must be alleged showing that the plaintiffs were injured or damaged by the decision sought to be reviewed.
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> "* * * There is nothing in the physical situation of the

two properties to justify an inference that plaintiff's building would be damaged by the granting of the variation."

In the case before us the only allegation in the complaint with reference to the damage which the plaintiffs would suffer if the decision of the Zoning Board of Appeals was sustained is that they are residents and property owners residing not more than two city blocks from the area in question, that if the proposed parking lot were established their property would be diminished in value and that they would suffer pecuniary loss, inconvenience and hardship thereby. The only evidence in the hearing before the Board of Appeals with respect to damages was a statement of a witness that the proposed parking lot would destroy the residential aspect of the neighborhood and would make other property less desirable for residential purpose and that it would not contribute to safety and security in such an area. The allegations were mere conclusions of the pleader, and as was pointed out in Winston v. Zoning Board of Appeals, 407 Ill. 588, they should have been supported by allegations of specific facts. In its decision the Zoning Board of Appeals imposed limitations restricting the lot to the use of private passenger automobiles and requiring landscaping and planting of shrubbery, and further provided that the lot shall be black-topped and properly drained, that bumper guards and a fence shall surround it, and that it must be kept in a clean and orderly manner at all times. The secretary and treasurer of the North West Federal Savings and Loan Association testified on the hearing before the Zoning Board of Appeals that it was their intent to have supervision over the parking lot during the time when it was in use and that after hours it would be closed by chains drawn across the entrance.

It thereupon became necessary for the plaintiffs to prove at that hearing by competent evidence in what way they would be injured. We find no such evidence in the record. Winston v. Zoning Board of Appeals, supra; Garner v. County of DuPage, 8 Ill.2d 155; 222 E. Chestnut St. Corp. v. Bd. of Appeals, supra.

The plaintiffs stress the fact that in their amended complaint they have alleged that they are not permitted to use their land for parking lots, which allegation was denied in the answer. It is true that in Winston v. Zoning Board of Appeals, supra, on a motion to dismiss the complaint, the court says that in order for the plaintiffs to show that they were aggrieved by the decision of the Zoning Board it would be necessary for them to allege, for example, that their property was classified in the same district as the land in question but that they were not permitted the use allowed by the variance. However, reading the entire opinion in the Winston case it is apparent that the contention of the plaintiffs that that one allegation standing alone was sufficient even to state a cause of action cannot be sustained.

We will next consider the second point raised by the plaintiffs, that the zoning ordinance expressly prohibits a parking lot serving transients from being established in a district zoned for duplex residence use. The zoning ordinance was construed in Illinois Bell Telephone Co. v. Fox, 402 Ill. 617, where it was contended that section 24 of the zoning ordinance was subject to the restrictions contained in sections 15 and 16 of the zoning ordinance pertaining to lot area and maximum height of buildings in residence, duplex and apartment house districts. The telephone company sought a special use under section 24 to build a telephone exchange in a residence district. Its plans were not in conformity

with the restrictions contained in sections 15 and 16. The Board of Appeals refused to grant the special use. The Circuit Court reversed the Board of Appeals and entered a judgment holding sections 15 and 16 of the zoning ordinance to be inapplicable to special uses listed in section 24, and the court in construing section 24 states:

"Returning to the fundamental issue of the proper construction of section 24 of the zoning ordinance, the precise question here presented for determination is whether sections 15 and 16, imposing restrictions on ground area and height, are applicable to special uses under section 24. The rules for the construction of an ordinance are the same as those applied in the construction of a statute. (Dean Milk Co. v. City of Chicago, 385 Ill. 565; People ex rel. Dwight v. Chicago Railways Co., 270 Ill. 87.) As in the case of statutes, the primary rule for the construction and interpretation of ordinances is to ascertain and give effect to the intention of the law-making body. (People ex rel. Schriver v. Frazier, 386 Ill. 620; People ex rel. Toman v. Chicago Great Western Railroad Co., 379 Ill. 594.) Furthermore, under familiar principles, a statute itself affords the best means of its exposition, and if the legislative intent can be ascertained from the provisions of the statute that intent will prevail without resort to other aids for its construction. (Deutsch v. Department of Insurance, 397 Ill. 218; People ex rel. Blome v. Nudelman, 373 Ill. 220.) Accordingly, the general scheme of the ordinance and the specific language of section 24 must be first considered. The earlier provisions of the ordinance, sections 3 to 18, inclusive, are entirely concerned with the imposition of zoning restrictions. There follows a number of sections relating to exceptions to the ordinance, such as nonconforming uses and variations, among them section 24 pertaining to special uses. A question of construction arises because sections 15 and 16 imposing maximum limits on the ground area and height of buildings do not specifically include special uses and section 24 does specifically exclude the operation of sections 15 and 16 as to special uses.

"Section 24 commences with the rather unusual phrase, 'Subject to the rules set forth in this Section 24.' To these words some meaning must be ascribed, yet, apart from the quoted phrase, the power of the board of appeals under section 24 is, of course, subject to the rules there set forth. Unless these words be regarded as superfluous, they constitute an important indication of the intention of the city council. A review of the entire ordinance reveals that it is a well-drawn, carefully worded, comprehensive enactment and there is no other evidence of superfluous or redundant language. If possible, no legislative enactment should be so construed as to render any sentence, phrase or word superfluous, void or insignificant. (Wells Bros. Co. v. Industrial Com., 285 Ill. 647; Bigelow v. Burnside, 269 Ill. 324.) Rejecting an interpretation which would render the introductory

clause nugatory, we hold that the circuit court fairly and reasonably construed the words, 'Subject to the rules set forth in this Section 24,' to mean that the special uses mentioned in section 24 are subject only to the rules contained in section 24. We are aided in this interpretation of legislative intent by reason of the location of section 24 among other sections relating to exceptions and exclusions from the restrictive provisions of the earlier sections of the ordinance. Read in the light of this construction, section 24 provides that the special uses there enumerated are subject only to the rules therein set forth. Thus, sections 15 and 16 can have no application to section 24 and the only test of approval of a special use is whether it is necessary at a particular location for public convenience and necessity.

"The provision of section 25 that the board of appeals may impose such conditions and restrictions on special uses as may be necessary to minimize the effect of a special use on adjoining property, confirms this construction. Section 25 would be virtually meaningless unless it were contemplated that special uses permitted under section 24 were not to be limited to the maximum height and ground area imposed by sections 15 and 16. If special uses under section 24 are subject to the ordinary restrictions on height and volume there would be no occasion for imposing further conditions and restrictions. Lastly, the prior decisions of the board of appeals and the interpretation made by the chairman of the subcommittee of the city council on zoning prior to the adoption of the ordinance, while of no great probative force, also tend to confirm the construction of the ordinance by the circuit court."

This case was decided in 1949 prior to the enactment of the off-street parking amendment to the zoning ordinance. Plaintiffs contend that section 4.1, subsection A-10, absolutely prohibits the establishment of a parking lot of this character irrespective of the provisions of section 24, and that consequently the decision in the Illinois Bell Telephone Co. case is not binding.

The so-called "Off-Street Parking Ordinance" was passed on August 18, 1953, by adding section 4.1 as an amendment to the Chicago zoning ordinance. Its purpose was to make mandatory the furnishing of off-street parking for the use of the occupants of buildings which were thereafter erected, enlarged, converted, or increased in capacity by adding dwelling units, and so forth. The ordinance by its terms was in part mandatory but it also included provisions with reference to

the permissive establishment of parking areas. Subsection A was entitled "General." Subsection A-10 provided that off-street parking facilities developed in any residence, duplex, group house or apartment house district in compliance with the requirements of this section shall be used solely for parking of passenger automobiles used by occupants of dwelling structures intended to be served, or for the guests of occupants, and it further provided that under no circumstances shall such parking area be used for the storage of commercial vehicles or for the parking of passenger automobiles belonging to employees, owners, tenants, visitors, or customers of business, commercial, manufacturing or industrial establishments, except as permitted in subsection D. Subsection D provides that parking facilities serving non-residential uses of property may be permitted in an apartment house district when authorized by the Board of Appeals, and provides that such parking lots shall be used solely for the parking of passenger automobiles, that no repair work can be done, and so forth, which restrictions are in addition to the general requirements of subsection C regulating all public off-street parking areas as to construction, access, landscaping, and so forth.

Subsection A-14 as amended on July 28, 1954 provides: "Automobile parking facilities developed for transient trade and not auxiliary to specific main uses or group of uses requiring parking space, shall be treated as a 'Special Use', as defined in this ordinance, and shall be subject to conditions authorized by the Board of Appeals. * * *"

It is apparent from the wording of subsection A-10 that it refers only to off-street parking facilities made mandatory by the amendment to the ordinance. It does not refer to or in any way limit automobile

parking facilities developed for transient trade and not auxiliary to specific main uses. The restrictive provisions therein contained were to make sure that the parking facilities developed in the districts therein designated should be used solely and exclusively for passenger automobiles used by the occupants of such dwelling or their guests. Subsection A-14 deals with parking facilities developed for transient trade and it specifically provides that such facilities shall be treated as a special use, as defined in the ordinance, and be subject to such conditions as may be authorized by the Board of Appeals. Section 24 of the original ordinance dealt with special uses and was the section of the ordinance construed in Illinois Bell Telephone Co. v. Fox, supra. On July 28, 1954, the same day that section A-14 was amended, the city council also amended section 24 by adding to the permissible exceptions for special use in a family residence, duplex residence or group house district: "(e) a parking lot." When the city council amended section 24 of the zoning ordinance it was aware of the decision of the Supreme Court in Illinois Bell Telephone Co. v. Fox, supra. If it had been its intention to have prohibited parking lots for transient trade in a duplex residence district it would have so provided. There is nothing in the ordinance which could lead to the conclusion that the rules laid down in the Illinois Bell Telephone Co. case are not applicable, and under that rule the Zoning Board of Appeals had the right to permit a parking lot of the character herein involved in the district in question.

The only other question remaining is the third contention of the plaintiffs, that the finding of the Zoning Board of Appeals was against the manifest weight of the evidence and was arbitrary. It has been

repeatedly held by our Supreme Court that the only function of courts reviewing orders of administrative agencies is to consider the record to determine whether the findings and decisions of the administrative agency are against the manifest weight of the evidence. Drezner v. Civil Service Com., 398 Ill. 219; Brown Shoe Co. v. Gordon, 405 Ill. 384; Oswald v. Civil Service Com., 406 Ill. 506; Secaur v. Civil Service Com., 408 Ill. 197; Gibbons v. Retirement Board, 412 Ill. 373; Harrison v. Civil Service Com., 1 Ill.2d 137; Logan v. Civil Service Com., 3 Ill.2d 81; Parker v. Dept. of Registration, 5 Ill.2d 288.

In the case before us it seems plain that there was a debatable question and that it was a matter for the proper exercise of the discretion of the Zoning Board of Appeals. In Illinois Bell Telephone Co. v. Fox, supra, the court says:

> "Defendants misinterpret the obvious import of the word 'necessary' appearing in the statute. A word of great flexibility, 'necessary' may mean 'absolutely necessary' or 'indispensable,' or, less restrictively, 'expedient' or 'reasonably convenient.' (Brooks v. Chicago, Wilmington and Vermilion Coal Co., 234 Ill. 372; Aurora and Geneva Railway Co. v. Harvey, 178 Ill. 477.) If plaintiff must show that the site selected is absolutely necessary and indispensable for the rendition of telephone service, then section 24 is both unworkable and absurd. * * * Under the circumstances, we are impelled to hold that any reasonably convenient or expedient location is a necessary location, within the contemplation of the ordinance."

From the evidence the Zoning Board of Appeals could have found that the parking lot was necessary for parking convenience. As we have pointed out, there was no evidence in the record as to how plaintiffs would be injured thereby, and even if such evidence had been in the record, it still would be within the discretion of the Zoning Board of Appeals to determine as to whether public necessity would outweigh whatever injury might result. In Forbes v. Hubbard, 348 Ill. 166, the court says:

> "Where it appears that the restrictions of a zoning ordinance bear substantial relation to the public health, safety, morals or general welfare, such a consideration is determinative regardless of the fact that individuals may suffer an invasion of their property."

Nor is it an objection to an honest legislative solution of a public problem that it will incidentally lead to private profit or advantage. Pierce v. Town of Wellesley, 146 N.E.2d 666 (Mass.).

The finding of the Zoning Board of Appeals was not against the manifest weight of the evidence.

We have no right to pass on any constitutional questions raised in the briefs. Case v. City of Sullivan, 222 Ill. 56; Rogers v. Carterville Coal Co., 254 Ill. 104; Barnes v. Drainage Comrs., 221 Ill. 627.

The judgment of the Superior Court is affirmed.

Affirmed.

Schwartz, P. J., and Robson, J., concur.

Asbtract only.

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47221

17 I.A. 2d 281

MAGDA NEWBERG, Appellee, v. EDWARD JACKSON and FORREST JACKSON, HIS WIFE, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

An action in forcible detainer was brought against the defendants. The trial court after a hearing without a jury entered judgment in favor of the plaintiff, from which judgment this appeal is taken. The defendants contend they had entered and had possession of the property in question as vendees of the plaintiff and that the plaintiff had failed to give the requisite notices provided for by statute.

From the evidence it appears that on or about April 12, 1956 the defendants, Edward Jackson and Forrest Jackson, his wife, together with their six children, moved into property then owned by plaintiff Magda Newberg. The family of the defendants occupied four rooms on the ground floor, the plaintiff two rooms. On the second floor there was a six room apartment rented to another tenant. At the time defendants moved into the property there was an arrangement between them and the plaintiff that the defendants would collect the rent from the tenant and make all the necessary payments required for a mortgage which was then on the property, and they were to furnish the plaintiff with her meals together with certain money to be given her for cash. Defendants charged her $15.00 a week for her rooms, which she

paid from April to August. The plaintiff denies that she made any such payments. The defendants did make payments on the mortgage with the knowledge and consent of the plaintiff. During May of 1956 the parties entered into a written agreement under the terms of which the defendants agreed to buy the property from the plaintiff for $23,000 with a down payment of $1,000, the balance to be paid in monthly installments of $230 or more, with interest on the unpaid balance of six per cent. The figures were to be computed as of April 1, 1956. The contract also provided that "credit for all payments made upon behalf of the first party shall be given to second party against monthly payment." The defendants did not pay $1,000 down as provided in the contract; however, the defendants proved payments made by them on the mortgage, the maintenance of the property, together with allowances made to them by the plaintiff. At no time did the defendants pay any rent to the plaintiff. After July, 1956, the defendants did not collect any more rent from the tenants in the second floor apartment, nor did they collect rent in August from the plaintiff.

From the uncontradicted testimony of the defendants it appears that they had paid on the contract entered into in May, 1956, $3,866.52, which payments were those that they had made on the mortgage, water bills, together with allowances given them by the plaintiff.

Before filing the suit in forcible detainer the plaintiff served the defendants with a notice demanding immediate possession of the property.

The Act dealing with forcible entry and detainer (chap. 57, Ill. Rev. Stat. 1955) provides in sub-paragraph 5 of section

2 that an action may be brought when a vendee has obtained possession of property under a written or verbal agreement to purchase the same, and having failed to comply with his agreement, withholds possession thereof after demand in writing by the person who is entitled to possession. Section 3 of the Act further provides that under such circumstances a 30-day notice must be given to the defendnat that proceedings under the provisions of the Act are to be instituted. "It is therefore apparent that since the amendment a thirty days' notice and a subsequent demand are both necessary before instituting suit. The statute nowhere requires the demand to be made thirty days before suit. It is the notice, only, which must be served thirty days prior to the demand for immediate possession." Given v. Lofton, 359 Ill. 228. In the case before us no notice was served. The demand upon the defendants by the plaintiff was served on February 14, 1957. Suit was filed on February 15, 1957. The evidence shows that the defendants had possession under a contract of sale, hence the demand for immediate possession, alone, was not a sufficient compliance with the statute to support an action for forcible detainer. Craft v. Calmeyer, 274 Ill. App. 296.

Plaintiff contends that the defendants were tenants at will, and she also inconsistently argues that no landlord and tenant relationship existed between the parties. There is nothing in the record to substantiate plaintiff's claim that the occupancy by the defendants was a tenancy at will. We can agree with the plaintiff's contention that no landlord and tenant arrangement existed between the parties. The defendants did not pay any rent.

There was no question that the plaintiff had signed the contract of sale which was introduced in evidence. Nor was it denied that the defendants on behalf of the plaintiff had paid on the contract $3,866.52. There was evidence in the record that during the entire period involved plaintiff was sick and the trial court apparently was influenced by this evidence since he stated at the time when he rendered the decision that the defendants had intended to defraud the plaintiff. It is elementary that matters of title cannot be inquired into in a forcible entry and detainer action. There was in existence a contract properly executed. The plaintiff did not comply with the law in serving the necessary 30-day notice. We cannot speculate as to whether or not the plaintiff might have been entitled to relief before another forum and in another form of action.

The judgment for possession on the record before us should not have been entered. The judgment of the Municipal Court of Chicago is reversed.

REVERSED.

SCHWARTZ, P.J., and ROBSON, J., CONCUR.

ABSTRACT ONLY.

A

47168

17 I.A. 2d 281

IN THE MATTER OF THE ESTATE OF RAYMOND H. PARKER, Deceased. GLORIA A. PARKER, Appellee, v. RAYMOND H. PARKER, Administrator, Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order appointing the petitioner, Gloria A. Parker, the administratrix of the estate of the decedent, Raymond H. Parker. The decedent, a resident of Chicago, died there intestate on June 2, 1953. The decedent's son, appellant herein, was appointed administrator of his father's estate by the Probate Court of Cook County on November 24, 1954. The appellant filed a petition for the issuance of a citation against one Helen Hutchinson, also known as Gloria A. Parker, alleging that she had in her possession certain documents and property belonging to the decedent. On December 21, 1954, Gloria A. Parker appeared before the Probate Court of Cook County and presented a petition to have the appellant removed as administrator and have herself appointed administratrix in his place. The Probate Court heard the matter on petition, answer, and reply, found that Gloria A. Parker is the widow of the decedent and ordered that she be substituted as administratrix in place of the appellant. The appellant perfected an appeal to the Circuit Court of Cook County, where a trial de novo confirmed the findings of the Probate Court and an order was entered

finding Gloria A. Parker the widow of the decedent and appointing her administratrix of his estate. This appeal has been taken from that order.

The facts revealed by the record clearly indicate that one Gloria Anne Morgan and the decedent were married at Rochester, Minnesota, on August 18, 1939; that three months prior thereto a decree had been entered in the Superior Court of Cook County, Illinois, granting one Olga V. Parker a divorce from the decedent; and that one Helen Hutchinson was granted a divorce from Raymond Hutchinson in the Circuit Court of Kosciusko County, Warsaw, Indiana, on September 15, 1921. Two witnesses, one of whom was the widow of the judge who performed the Minnesota marriage, identified Gloria Anne Morgan and Helen Hutchinson as Gloria Anne Parker, the petitioner and appellee herein. Various documents in the record reveal that the petitioner has not always told the truth about her age. Appellant now urges that this fact substantiates the inference that the petitioner, who was also known as Helen Hutchinson is not the Gloria Anne Morgan designated in the Minnesota marriage certificate. The Circuit Court reviewed all of the documentary evidence and heard the testimony of the witnesses. We cannot say that its findings of fact were against the manifest weight of the evidence. <u>In re Estate of Sandusky,</u> 321 Ill. App.1 (1943).

The appellant also contends that the marriage between the petitioner and the decedent was void because of a Minnesota statute prohibiting a marriage within six months after either party has obtained a divorce from another spouse.

Under Minnesota law such a marriage is valid until set aside by a competent court and is not a nullity. State v. Yoder, 113 Minn. 503, 130 N.W. 10 (1911); In re Kinkead's Estate, 239 Minn. 27, 57 N.W.2d 628 (1953). The marriage was valid and subsisting at the time of the decedent's death. Plaintiff cannot in this proceeding attempt to attack it collaterally. There was no error in the ruling that the petitioner was the widow of the decedent.

Order affirmed.

Schwartz, P. J., and McCormick, J., concur.

Abstract only.

A

47234

17 I.A. 2d 282

EVELYN J. SMITH, Appellant,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
JOSEPH WEISS, d/b/a LINCOLN FURS, Appellee.	)	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order dismissing plaintiff's suit to recover damages for the loss of a fur coat. The question presented is whether a former action concluded in favor of defendant constitutes a bar to this suit.

The defendant is a furrier and does business under the name "Lincoln Furs" at 5122 Lincoln avenue in Chicago. The plaintiff's statement of claim alleges in substance that plaintiff delivered certain furs, including a mink coat, to defendant for storage and repair on May 6, 1955; that defendant received the furs and issued a receipt to plaintiff; that as a part of the contract to store and repair, the defendant warranted by implication that plaintiff would be fully protected against loss by fire or theft; that plaintiff relied on such warranties in placing the furs in defendant's possession; that plaintiff made a demand upon defendant to return the furs and learned at that time that the mink coat had been stolen during a burglary of defendant's business premises on September 15, 1955; and that plaintiff has been injured by defendant's breach of warranty in failing to reimburse her for the coat which has never been returned. Attached to the

claim as exhibit one is the following receipt which defendant gave plaintiff:

"Plaintiff's Exhibit 1

5122 Lincoln Avenue
Chicago 25, Ill.

Phones: Longbeach
0819-0820

LINCOLN FURS

Sales Order No. 1249

Name Mrs. F. T. Smith
Address 2425 W. Farragut
City
Phone Lo 1-4798

Valuation	Description of Merchandise
	Stock No.
1	Mink coat cleaned Glazed Stored
Insurance	Black Persian cape repairs
Policy No	Cleaned Glazed Stored
	General repairs by neck
	1 Pr foxes Stored
Corrections To Be Made	Terms of Sale
	$31.00
	32.50
(Signed) J Weiss	$63.50."

In a prior action filed in April, 1956, plaintiff instituted suit in the County Court of Cook County against the same defendant to recover for the loss of the same fur coat. That suit was predicated on the same bailment contract now asserted by plaintiff. Attached to the complaint therein was the identical receipt attached to the statement of claim in the instant suit. The prior suit resulted in summary judgment for defendant. The defendant raises that judgment as a bar to the instant action, while plaintiff insists that an implied warranty in the contract gives rise to a new cause of action.

Both the former suit and the instant action involve the liability of defendant as a bailee for hire. Unless the parties to a bailment for mutual benefit enter a special contract defining the duties of the bailee, the bailee is bound only to exercise ordinary care in the safekeeping of the goods entrusted to him. Schaefer v. Safety Deposit Co., 281 Ill. 43 (1917); Wiegert v. Davis Cleaning and Dyeing Co., 254 Ill. App. 63 (1929); Rhodes v. Warsawsky, 242 Ill. App. 101 (1926). The rule that the ordinary bailee is not an insurer of the goods entrusted to him is stated as follows in 6 Am. Jur. Bailments, sec. 242:

> "The rule appears well settled that unless made so by statute or express contract, an ordinary bailee, no matter to what class he belongs, is not an insurer of goods delivered into his keeping, although, as respects a few special kinds of bailees, such as common carriers and innkeepers, it seems that public policy makes them such."

This statement is consistent with Illinois law. See (involving mutual benefit bailments) Standard Brewery v. The Bemis and Curtis Malting Co., 171 Ill. 602 (1898); Lathrop v. Goodyear Tire & Rubber Co., Inc., 325 Ill. App. 281 (1945); (involving gratuitous bailment) Parker v. Dietz, 203 Ill. App. 120 (1916); (involving carriers) Hinchcliffe v. Wenig Teaming Co., 274 Ill. 417 (1916); Shapleigh Hardware Co. v. Southern Railway Co., 222 Ill. App. 360 (1920); (involving innkeepers) Rockhill v. Congress Hotel Co., 237 Ill. 98 (1908); National Malted Food Corp. v. Crawford, 254 Ill. App. 415 (1929).

The judgment for defendant in the County Court determined that he had not failed to exercise ordinary care for

plaintiff's property. Plaintiff now insists that defendant breached a special contract to insure the goods entrusted to him. Plaintiff further insists that the judgment determining that there was no negligence on the part of defendant does not preclude her subsequent assertion of a claim for breach of contract.

There is no merit in a distinction between the tort liability of a bailee and his liability under the contract of bailment, unless, as heretofore indicated, there is a special contract between the bailor and bailee defining the terms under which the bailee agrees to accept, hold, and return the goods. In the absence of such a contract the liability of the bailee for failure to return the goods on demand is determined by applying to him a standard of ordinary care. Although, in the instant case, plaintiff alleges that there was such a special contract, the only indicia thereof was incorporated in the complaint in the former suit, as well as in the statement of claim in the instant suit. Thus defendant's liability on any purported special contract could have been determined in the prior action. It is a well-settled principle of the doctrine of res judicata that a judgment on a specific cause of action precludes a subsequent suit between the same parties on the same cause of action, not only as to issues actually concluded, but as to all issues which might have been raised in the former suit. Chicago and Western Indiana R. Co. v. Alquist, 415 Ill. 537 (1953); Leitch v. Hine, 393 Ill. 211, 220 (1946); Daviditis v. National Bank of Mattoon,

6 Ill. App.2d 286 (1955).

We conclude that there is no merit in the contentions advanced by plaintiff on this appeal. The order of the trial court dismissing the statement of claim is affirmed.

Order affirmed.

Schwartz, P. J., and McCormick, J., concur.

Abstract only.

A

17 I.A. 2d 283

47153

IN THE MATTER OF THE ESTATE OF ULREH VOGT, Deceased.	APPEAL FROM
FRANCES VOGT, Petitioner-Appellee, v. ULREH VOGT, JR., As Administrator With Will Annexed of the Estate of Ulreh Vogt, Deceased, Respondent-Appellant.	CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a proceeding to remove respondent Ulreh Vogt, Jr., as administrator of the estate of his deceased father. The Probate Court ordered the revocation of the letters of administration and removal of the administrator. He appealed to the Circuit Court where, after a hearing, the trial judge also ordered the removal. The administrator has appealed.

The order appealed from, entered October 26, 1956, recites that the matter had been submitted to the Circuit Court on the Probate Court record and the transcript of the proceedings there. The Probate Court order, entered August 3, 1955, found that the administrator had failed to file a sufficient bond, had failed to file a proper inventory and had wasted and mismanaged the assets of the estate.

The administrator contends that he was never properly brought before the court in accordance with Section 432 of the Probate Act (Ill. Rev. Stat., Chap. 3, Par. 432) or served

with any statement of charges against him. These points were not made in either the Probate or Circuit Court and neither court, therefore, had an opportunity to pass on the question whether the petition was sufficient to inform the administrator of the charges against him and whether his participation in the Probate Court proceeding waived the citation provisions of section 432. The points are not properly before us for review and are not jurisdictional. In Munroe v. The People, For Use, Etc., 102 Ill. 406, relied on by the administrator, the lower court exercised jurisdiction it did not have.

The remaining point made is that there was no proper trial de novo in the Circuit Court. The Circuit Court order recites: "The matter having been submitted to this Court on the record from the Probate Court and the transcript of proceedings." We presume, in the absence of a contrary showing in the record, that the recital is true.

The administrator argues that the transcript of the Probate Court proceeding used in the Circuit Court was not certified or approved. This objection was not made in the trial court and there is no contention that the transcript is not true. There is nothing to show that the administrator did not submit the matter on the Probate Court record. There is no merit, therefore, to the contention that the proceeding in the Circuit Court was not a trial de novo. The cases of Burstein v. Millikin Trust Co., 350 Ill. App. 462, and Barnes v. Earle, 275 Ill. 381, are not pertinent.

A

17 I.A. 2d 284

47163

IN THE MATTER OF THE ESTATE OF ULREH VOGT, Deceased.	APPEAL FROM
FRANCES VOGT, Petitioner - Appellee, v. ULREH VOGT, JR., As Administrator With Will Annexed of the Estate of Ulreh Vogt, Deceased, Respondent - Appellant.	CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Respondent-administrator appeals from an order of the Circuit Court finding petitioner Frances Vogt to be the surviving spouse of Ulreh Vogt, deceased; approving an appraisers report setting off $3,000.00 as her widow's award; and ordering the administrator to pay her that sum.

This is the second appeal seeking to set aside an order allowing the award. We reversed the original order and remanded the cause for further proceedings In Re Estate of Vogt, 10 Ill. App. 2d 333.

The "further proceedings" on remandment were ordered limited to the issue "whether petitioner is the surviving spouse." In the original trial de novo the administrator's amended answer denied petitioner was the surviving spouse and we held that petitioner's motion to strike admitted that fact. We decided that in the face of the issue made by the pleadings there was error in finding on the pleadings petitioner was

the surviving spouse. On the re-trial de novo the court had before it oral and documentary evidence. The administrator contends the finding that petitioner is the surviving spouse is against the manifest weight of evidence. He raises three other points but these were decided adversely to him on the prior appeal and are settled law in the case.

We are not impressed with administrator's argument that he was compelled to assume the burden of proving the issue of the surviving spouse. No prejudice has been shown even if the burden of proof were misplaced by reason of the construction of a statement in our prior opinion. Neither can we see that the trial was unfair to the administrator.

There was before the court the administrator's sworn application for letters of administration in which he named petitioner as decedent's "wife"; his sworn testimony in the Probate Court, in proving heirship, in which he named petitioner as decedent's undivorced second wife; and the Declaration of Heirship in the Probate Court declaring petitioner to be decedent's "widow." There was also before the court the oral testimony of the administrator which did not contradict the documentary proof but which inferentially corroborated that proof.

We think there is no merit to the contention that the finding that petitioner is the surviving spouse is against the manifest weight of the evidence.

No other substantial points are made. The order is affirmed.

AFFIRMED.

LEWE AND MURPHY, JJ., CONCUR.

ABSTRACT ONLY.

47172

17 I.A. 2d 285

MARY A. FRUNK, BETTY LINDSEY, JOHN A. FRUNK, JR., a minor by JOHN A. FRUNK, SR., his father and next friend, and JOHN A. FRUNK, SR., Appellees, v. THE CITY OF CALUMET CITY, a Municipal corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against it for $42,500 in favor of plaintiff Mary A. Frunk. The jury found the defendant not guilty as to the claim of John A. Frunk, Sr., and Betty Lindsey and John, Jr., dismissed their claims at the close of plaintiffs' case. The trial court overruled defendant's post-trial motions for a new trial and for judgment notwithstanding the verdict.

The complaint consisted of a single count for damages sustained by plaintiffs, as a result of a collision between an automobile driven by Betty Lindsey and a fire truck of defendant. It included an allegation that the truck was wantonly and maliciously operated. The answer denied all allegations of negligence and damages.

The collision occurred about 2:30 in the afternoon of March 30, 1950, a clear bright day, at the intersection of 159th Street (Route 6), running east and west, and Burnham Avenue, running north and south, at the then outskirts of the

city of Calumet City. Both are four-lane highways, and the intersection is marked with four stop and go lights. It is undisputed that the traffic lights were "green" for north and south traffic and "red" for east and west traffic, just prior to and at the time of the occurrence; that the fire truck was proceeding west on 159th Street in response to a fire call and entered the intersection on the "red" traffic signal; that plaintiffs were on Burnham Avenue, proceeding from north to south, and entered the intersection on the "green" light; that Betty Lindsey, the twenty-one year old daughter of Mary Frunk, was driving the car, which was owned by John Frunk, Sr., husband of Mary and stepfather of Betty; that Mary Frunk was in the right front seat, and John, Jr., the six year old son of Mary and John, Sr., was in the rear seat; and that John, Sr., was not present. The front of plaintiffs' car collided with the right rear wheel of the fire truck, in the outer southbound lane of Burnham Avenue, at or near the center of 159th Street. The three Frunks and Betty lived together. Mary Frunk's injuries were severe, and she was confined to a hospital for some time. No point is made as to her injuries or the size of the verdict.

The principal factual issues were (1) whether the fire truck failed to sound a siren or give other signal of its approach; (2) the speed at which it entered the intersection; and (3) whether plaintiff Mary Frunk was guilty of contributory negligence.

Betty and John, Jr., did not testify. John Frunk, Sr., testified that Betty was living in Florida, with a newly born baby. Mary testified: "I was coming from Hammond, from shopping. I went over to pick up a pair of shoes for my younger daughter. * * * Betty was driving my husband's car. * * * I was seated in the front * * *. The little boy was in the back seat. * * * I had to be back on duty at five o'clock at the Lansing Exchange. * * * The car in which I was riding was going south on Burnham. * * * Before we came to that corner [159th Street] it seemed to me like there was a squad car coming from the outside of the other cars * * *. It could have been half a block or so. * * * We were coming into the green light traffic. * * * We were going between twenty and twenty-five. * * *As we entered the intersection the lights were green for us, as we passed the stop and go sign the lights were still green. * * * I did not see any school bus going in the opposite direction. * * * As we entered the intersection I remember the fire truck zooming right into the car; that is all I remember. It seemed like it came from the sky, and I was probably frightened then. I don't remember anything that happened afterwards. The next I remember I was in the hospital, in bed."

Plaintiffs' witnesses, Mrs. Leo Frank and her son "Jimmy," a thirty year old mechanic, testified they were driving west on 159th Street, and when they were about three or four blocks east of Burnham Avenue they heard a police car siren. The police car went around them and continued on. The fire truck, going west, passed them east of the northeast corner

traffic light, as they slowed down to stop for the red light. They saw a school bus on Burnham Avenue, traveling north and in the process of clearing the intersection at the time the fire truck entered it on the red light. The speed of the fire truck was 35 to 40 miles an hour and did not vary from the time it passed them until the impact. They heard no siren blowing as it passed them. They did not see or hear the fire truck coming. The first time they saw it was when it flashed past them on the left, about 100 feet east of Burnham Avenue. They both saw the impact, and Mrs. Frank estimated the speed of plaintiffs' car to be 25 miles an hour but no faster. She did not give her name to the police at that time, but the next day she went back and gave her name to the police department.

Plaintiffs' occurrence witness, Raymond Ciastko, a partner in a gasoline service station located on the northeast corner of the intersection, was in the building, heard the siren, looked out the window and saw the fire truck going west, and estimated its speed to be about 40 miles an hour. It was 75 to 100 feet from the center of the intersection and was keeping a steady speed. He heard the crash but did not see it. The siren was a steady blast, and he heard it coming for about a block away, and that is what caused him to look out of the window.

Carl Maggio testified that he was the driver of the fire truck at the time of the occurrence, and John Zimmerman, the pipe man, was seated alongside him; that Mike Genova, the third man, was on the running board; that it was a ladder and

pump combination; that when he was a block away and going 30 to 35 miles an hour, he noticed the light changing, and as he drew closer he cut down the speed to about 15 or 20 miles an hour and entered the intersection on the red light at that speed and with the siren sounding; that the siren was started before they left the station and stayed on until the impact; that the truck had two continuous red flashing signal lights; that they did not pass any cars as they approached the intersection; that a police car, at a half block distance, preceded them all the way; that as he approached the intersection, he noticed a southbound car on Burnham Avenue and kept it in his vision until the impact took place; that he was wondering if she was going to slow down; that it was coming pretty fast and he could not judge the speed; and that the police squad car had stopped beyond the corner and it had a dome light flasher in operation.

The occurrence witnesses for defendant were the other two members of the fire crew, John Zimmerman and Mike Genova, and the police officer operating the squad car, Bernard Zimmerman, cousin of John. All three testified the fire truck entered the intersection on the red light at a speed of 15 or 20 miles an hour, and that the siren on the fire truck was sounding before and at the time of the impact. Genova did not see plaintiffs' car. John Zimmerman judged its speed to be 35 to 40 miles per hour. The police officer testified he escorted the fire truck all the way from the city hall and kept about a half block ahead of it. He could watch the fire truck from his

rear view mirror. He had his siren on continuously, except when on 159th Street, where there was no traffic. He did not use it at all on 159th Street. His duty was to "clear the intersection so that the fire equipment can go through without mishaps." He entered the intersection on the green light and stopped four feet west of the northwest stop and go light. His car was facing west, and as he sat there he saw the fire truck coming, through his rear view mirror, and judged its speed to be 15 to 20 miles per hour. While seated, and with his dome flasher light going, he saw the southbound car on Burnham Avenue, coming at a "pretty fast rate of speed" and "wondered" if it was going to stop. He saw it run into the fire truck, and the front end of the truck was past the intersection. He took Betty Lindsey to the hospital in the squad car and later to the police station. Although he observed the car coming from the north as he approached the intersection, he did not back up his squad car to head it off, he just sat there. He made out an accident report that day, and the name of Mrs. Leo Frank of Tinley Park appears on it, but he did not recall her at the scene. None of the other occurrence witnesses saw the school bus or the witnesses Frank before or after the impact. There are some variances in the testimony of Mrs. Frank and her son, and the defendant questions their presence at the time of the occurrence.

An extended discussion of the points and authorities cited by both sides is unnecessary.

Defendant contends that the overwhelming weight of the evidence shows that the sole proximate cause of the accident

was the reckless driving of Betty Lindsey, and that the clear preponderance of the evidence shows that the firemen on said fire truck were guilty of no negligence which caused or contributed to the accident. The jury was instructed that an Illinois statute was in effect, providing that a fire truck, as an authorized emergency vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign, shall slow down as necessary for safety but may proceed cautiously past such red stop sign or signal. Two witnesses testified the speed of plaintiffs' car was not in excess of 25 miles an hour. It entered the intersection on the green light, with defendant's squad car parked immediately west of the intersection, facing west, with its dome flasher light on and the driver sitting motionless at the wheel. His duty was to clear the intersection for the fire truck, and there is no indication that he did anything except to sit and watch both vehicles collide. Whether Betty Lindsey heard or saw the fire truck and disregarded it is speculative at the most. It could be that she heard the siren and thought it came from the squad car, which was parked clear of the intersection, and as the driver was motionless she may have assumed that the siren sounding had nothing to do with traffic which was to proceed on the green light. She could have assumed that the driver of the squad car would have been taking affirmative action to warn her if it was necessary to keep the intersection clear. Two of the crew of the fire truck saw her before they entered the intersection, but there is no testimony that she saw them. If she were watching the stop and go lights,

with her attention attracted to the squad car on her right, it would not be difficult for the jury to find that she was driving with due care and caution consistent with the then situation.

There is no merit to defendant's contention that the verdict in favor of Mary Frunk is against the manifest weight of the evidence. In order for a verdict to be contrary to the manifest weight of the evidence, where the evidence is conflicting, as in the instant case, an opposite conclusion must be clearly apparent. Stone v. Guthrie, 14 Ill. App. 2d 137; Bunton v. Illinois Cent. R. Co., 15 Ill. App. 2d 311. After examining all of the evidence in this case, we cannot say that an opposite conclusion to that of the jury is clearly apparent.

The driver of the fire truck, Carl Maggio, was called by plaintiffs as a witness under section 60 of the Civil Practice Act. On objection the court directed the witness to be examined as the "court's witness." Defendant claims this was reversible error, and that this practice is permitted only in criminal cases. We believe it is unnecessary to make a determination of this point, as the court should have permitted Maggio to be called as an adverse witness within the category of "foreman" under section 60, as he testified at the trial that he then was a fire captain, "boss of the crew I am working with." We fail to see how defendant was prejudiced in this instance.

Defendant argues that the failure of plaintiffs to produce Betty Lindsey and John Frunk, Jr., to testify gives rise to a presumption against Mary Frunk that their testimony would be unfavorable to her case. If this be conceded, defendant did not seek to have the jury instructed on this claimed

presumption, and apparently its attorney did not so argue to the jury. Nothing is shown on this point to predicate any error to the trial court.

Defendant contends that the verdicts returned by the jury are inconsistent and irreconcilable. An examination of the authorities indicates that where a verdict is for the actual participant plaintiff, a verdict against a non-participating plaintiff will not call for a reversal, where both claims are bottomed on the same occurrence facts on which the actual participant was successful. Kelly v. Powers, 303 Ill. App. 198; Greenberg v. Chicago Cab Co., 274 Ill. App. 666; Welter v. Bowman Dairy Co., 318 Ill. App. 305. John Frunk, Sr., in both his complaint and testimony, claimed damages based on the total loss of his automobile and the loss of services of his wife Mary. He did not appeal from the judgment against him, and as he was not an actual participant in the occurrence on which the claim of Mary Frunk is based, we do not find the inconsistency in verdicts to be such as to warrant reversal of the verdict in favor of Mary Frunk.

We do not agree with the contention that the evidence shows Mary Frunk was guilty of wilful and wanton negligence or contributory negligence as a matter of law. In order to recover, Mary had the burden of showing she was in the exercise of ordinary care at and just prior to the time of the accident. Her testimony indicates the first time she saw the fire truck was as they entered the intersection, when it "zoomed right into the car. * * * It seemed like it came from the sky." The green traffic light was an invitation to the driver and to Mary Frunk

to proceed through the intersection and an assurance that they could do so in safety. There is no direct evidence that either Mary or Betty heard or saw the fire truck until they entered the intersection.

There is no rule of law which prescribes any particular act to be done or omitted by a person, who suddenly finds himself in a place of danger. Lasko v. Meier, 327 Ill. App. 5. Whether Mary Frunk conducted herself as an ordinarily prudent person would have done, under like circumstances, was a question of fact for the jury to decide under proper instructions. Contributory negligence becomes a question of law only when it properly can be said that all reasonable minds would reach the conclusion, under the facts stated, that such facts did not establish due care and caution on the part of the person charged therewith. Thomas v. Buchanan, 357 Ill. 270. We cannot say that all reasonable minds would conclude that Mary Frunk was imprudent.

Defendant contends that it was prejudiced by instruction 8, which was:

> "You are instructed that contributory negligence, if any, on the part of the driver of an automobile cannot be imputed or charged to a passenger of that automobile."

We see no error in the giving of this instruction. In order to impute the negligence of the driver to Mary, it was necessary that there be some evidence showing an agency or a joint enterprise relationship. There is no evidence that Mary requested Betty to drive her to Hammond. Therefore, neither relationship being shown, Mary Frunk must be considered a guest passenger,

and the negligence of the driver, if any, could not be imputed to her, if she was not in any way the cause of such negligence, if any, and omitted no ordinary care for her own safety. Thomas v. Buchanan, 357 Ill. 270; Nonn v. Chicago City Ry. Co., 232 Ill. 378.

This case was tried by both the plaintiff and the defendant upon the theory of simple negligence. The plaintiff did allege that the truck was wantonly and maliciously operated, but no instruction was given or tendered by either party on the wanton or malicious charge, and the jury was not informed of any allegations of wantonness. No motion was made to withdraw from the consideration of the jury the allegation of wanton and wilful misconduct. Under these circumstances, we do not agree with the contention of defendant that a general verdict cannot stand, where there is insufficient evidence to support the allegation of wilful and wanton misconduct. Section 68, subsection (4), of the Civil Practice Act made it mandatory on defendant, before the case was submitted to the jury, to move to withdraw the ground of wilful and wanton misconduct from the jury on account of insufficient evidence.

The court denied defendant's motions to instruct the jury to find the defendant not guilty at the close of plaintiffs' evidence and after all evidence. Defendant's motions for a directed verdict or for judgment notwithstanding the verdict present the single question whether there is in the record any evidence which, standing alone and taken with all its intendments most favorable to the party resisting the motion, tends

to prove the material elements of his case. Lindroth v. Walgreen Co., 407 Ill. 121, 130 (1950). We believe evidence offered on behalf of Mary Frunk meets that test and does tend to prove the material elements of her case. The trial court was correct in denying defendant's motions to direct the jury for the defendant and the motion for judgment notwithstanding the verdict.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J., and LEWE, J., CONCUR.

ABSTRACT ONLY.

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47264

17 I.A. 2d 286

In the Matter of the Estate of GARRET MEADE, also known as George Meade, Deceased. JOHN MILLER, Appellant, v. CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Administrator DeBonis Non, etc., Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order disallowing the claim of John Miller against the estate of Garret Meade, also known as George Meade, deceased, who died in 1955. Miller claimed to have loaned decedent $40,000 on December 20, 1949. The Probate Court allowed the claim with interest. After a trial de novo, and without a jury, the Circuit Court disallowed the claim in toto. The principal question is whether or not the decision of the trial court is against the manifest weight of the evidence.

John Miller (claimant) testified that he had been in the real estate business and friendly with George Meade (decedent) for many years; that they had business dealings together, and decedent, as a tenant, had operated a night club in a building owned by Miller; that pursuant to previous arrangements, he and Meade met at the Exchange National Bank on December 20, 1949; that he drew a check on that bank for

$40,000, cashed it, gave the $40,000 currency to Meade and received therefor Meade's note for that amount; and that subsequently he received several payments from Meade, totaling $5500, and made notations of the payments on the back of the note and gave Meade receipts as the payments were made.

Nathaniel E. Ladon, an accountant and tax consultant for twenty-two years, testified in support of the claim that he had taken care of decedent's bookkeeping from 1943 until his death in 1955, had done some accounting work for claimant for a period of four years ending in 1951, and still prepares claimant's income tax returns; that at decedent's death he had records pertaining to decedent's business in his possession, including five receipts from Miller to Meade, which had been given to him (Ladon) by Meade, and that they were for payments made on the note owned by Miller; that Meade told him about the transaction of the judgment note for $40,000 in January, 1950; that he saw the $40,000 check go through Miller's account; that he delivered the five receipts to Mr. Duncan of the City National Bank and Trust Company, administrator de bonis non of the estate of decedent; that on or about the second or third conference with Mr. Duncan, he told him about the obligation; that he had given full information about the matter to the previous attorneys who had represented the estate and was under the impression that they had transmitted all that information to the Bank after it took over the estate.

An attorney testified in support of the claim that he had represented decedent from about 1931 until his death; that he was familiar with his signature; that Meade signed his name as George Meade, Garret Meade or G. Meade; that various documents, in evidence and shown him, bore the signature of Meade; that several of the documents had been prepared by him; and that plaintiff's exhibit 1, being the promissory note, bore the signature of Meade. On cross-examination he stated he was not a handwriting expert and was testifying as a layman, and that he believed exhibit 1 bore the signature of Meade, his former client.

Ten exhibits were received in evidence on behalf of claimant without objection. Exhibit 1 is a promissory note for $40,000, signed by G. Meade, dated December 20, 1949, due one year after date and bearing interest at the rate of four per cent per annum. Exhibit 2 is a cancelled check, dated December 20, 1949, payable to the order of "Cash," for the sum of $40,000, signed by John Miller and drawn on the Exchange National Bank of Chicago, and bearing cancellation perforations and the stamped endorsement of the Exchange National Bank, December 21, 1949. Exhibit 3A consists of five receipts signed by Miller, acknowledging payment of various sums of money on note of "George Meade" or "G. Meade," dated December 5, 1950; November 15, 1951; December 12, 1952; August 19, 1953; and September 1, 1954; each containing the same notation, "To Apply on Judgment Note of Dec. 20, 1949." Exhibits 4 to 10, inclusive, are genuine signature standards received in evidence by stipulation of both parties.

Three handwriting experts testified; two for claimant and one for the estate. Rudolph B. Salmon, an examiner of questioned documents for forty years, and Vernon Faxon, with twenty-five to thirty years' experience, testified they had examined the signature on claimant's exhibit 1 and compared it with the signature standards, exhibits 4 to 10, inclusive, and the estate's signature standards, exhibits 1 to 20, and gave their opinions that the signature on plaintiff's exhibit 1 and the signatures appearing on the other documents were written by the same person.

Herbert J. Walter, a handwriting expert with thirty-five years' experience, testified for the estate that in his opinion the signature on plaintiff's exhibit 1, "G. Meade," was written by a different hand than the other Meade signatures on the twenty estate standards in evidence.

A well-known attorney testified that he was an associate attorney in handling the estate of decedent, and in July, 1955, he and his associate had a conversation with Mr. Ladon, Miller's accountant witness, in his home, about the assets and liabilities of the estate of the decedent; that Ladon did not mention the $40,000 note at that time; that Ladon did mention a piece of real estate in Evanston, which was subject to a mortgage of approximately $40,000, and, using an income statement, showed him the gross rents and the net of the building; that Ladon told him Meade had been in the gambling business and dealt in large sums of money and had no checking account; and that he met Ladon three times in all and at no time did Ladon tell him about the note of $40,000.

In order to be successful, appellant's evidence must be so strong and convincing as to overcome completely the evidence and presumptions, if any, existing in favor of the opposite party. 2 I.L.P., Ch. 13, §786; People, ex rel. Lauth v. Wilmington Coal Co., 402 Ill. 161 (1949).

A resume of the evidence for claimant shows that it consists of (1) testimony of claimant himself, who testified as to the delivery of $40,000 in currency to the decedent and offers in corroboration (a) the note, which he claims bears the signature of the decedent; (b) the cancelled check for $40,000, dated December 20, 1949; and (c) five receipts from him to Meade, which would be self-serving documents if not found in possession of decedent or his agent; (2) Ladon, the accountant, who testified that the decedent had told him about the loan in January, 1950; that decedent had given him the five installment payment receipts, and that they were in his possession when decedent died and were delivered by him (Ladon) to the administrator de bonis non; and that he had told the former attorneys for the estate, and later Duncan, an employee of the administrator de bonis non, about the $40,000 note; (3) the attorney for the decedent for many years, who, as a layman, testified the note bore the signature of the decedent; and (4) two professionally well-qualified and well-known handwriting experts, who, after comparing the note with stipulated signature standards in evidence, expressed the opinion that the signatures on the standards and on the note were by the same person.

The contrary evidence is (1) a well-recognized and well-known handwriting expert, who used the same standards as claimant's experts, and who expressed the opinion that the signature on the note was not written by the person who wrote the signature standards in evidence; and (2) a reputable attorney, who denied that Ladon had told him anything about the $40,000 note, but that Ladon did mention a parcel of real estate subject to a $40,000 mortgage and mentioned also that decedent was accustomed to handling large sums of currency and did not have a checking account.

The trial court decided that the evidence for the estate preponderated. The implied finding is that the note is a forgery. The estate contends that the evidence sustains that finding. In order for a decision of a trial court to be contrary to the manifest weight of the evidence, where the evidence is conflicting, an opposite conclusion must be clearly apparent. Olin Industries, Inc. v. Wuellner, 1 Ill. App. 2d 267, 271; Smith v. Billings, 68 Ill. App. 603, 604.

We think that our resume of the pertinent evidence makes "clearly apparent" that the trial court should have reached an opposite conclusion, and we find that the order disallowing the claim is against the manifest weight of the evidence. Where a cause is tried by the court, without a jury, and all of the evidence is in the record, and where the parties have had the opportunity to present all of their evidence, as in the instant case, no useful purpose is served by remanding the matter to the trial court for a new trial. Dayton Scale Co. v. Market

House Co., 335 Ill. 342. Therefore, the judgment of the Circuit Court is reversed and remanded, and the Circuit Court is directed to allow the claim with interest, with credit being given to the estate for the payments made by decedent, Meade.

REVERSED AND REMANDED WITH DIRECTIONS.

KILEY, P.J., and LEWE, JR. CONCUR.

ABSTRACT ONLY.

A

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

February Term, A. D. 1958

Term No. 58-F-14. Agenda No. 9.

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17 I.A. 2d 287

CITY FUEL & SUPPLY CO., A Corporation, PLAINTIFF-APPELLEE,	)	Appeal from the City Court of Alton, Illinois
Vs.	)	
MILLERS MUTUAL INSURANCE ASSOCIATION OF ILLINOIS, A Corporation, DEFENDANT-APPELLANT.	)	

FILED
APR 21 1958
James R. McFarlane
CLERK, 4TH DIST.

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BARDENS, J.

Plaintiff recovered a judgment in the City Court of Alton in an amount awarded by appraisers appointed to assess the fire loss of plaintiff's tank truck under the terms of a policy of insurance issued by defendant. Defendant's theory on appeal is that the appraisers' award was void because contrary to policy terms in various respects and that the judgment based thereon is erroneous.

There is no question on the pleadings, or as to the basic facts. Plaintiff's 1946 Chevrolet's fuel-oil tank truck, purchased used in 1950, was destroyed by fire in 1954. The policy of insurance issued by defendant insuring against said loss provided for the appointment of appraisers if the insured and the company were unable to agree on the amount of the loss. Such being

the case, each party appointed an appraiser and they, in turn, being unable to agree, secured the appointment of an umpire upon application in the City Court of Alton. At their meeting, plaintiff's appraiser and the umpire presented figures showing the aggregate cost of new or replacement parts to be $3,992.65, which, when properly depreciated to correspond with the age of the truck, would reduce the truck's value to $2,930.22, less the salvage. The appraiser appointed by the defendant disagreed with this figure and gave his estimate of $800.00 as the actual cash value, and $1,506.15 as the repair or replacement value. An award was thereupon determined by the umpire in the amount of $2,801.58, which sum defendant refused to pay. In an action heard by the Court, without a jury, judgment was thereupon entered for plaintiff in the amount of the award.

The scope of judicial review of appraisers' awards under insurance policies is succinctly stated in 29 Am. Jur. 1934:

> "As a general rule, courts will not interfere with the award of appraisers selected by the insurer and insured to appraise a loss under an insurance policy, except to prevent a manifest injustice. Every reasonable intendment and presumption will be indulged in to sustain such an award, and it will not be vacated unless it clearly appears that it was made without authority or was the result of fraud, mistake, or misfeasance of the appraisers. Nor will the court substitute its own judgment for that of the appraisers or set aside the award for inadequacy or excessiveness unless it is so palpable and manifest as to indicate corruption or partisan bias on the part of the appraisers."

Our concern is, therefore, whether the award of the

appraisers and the subsequent judgment of the trial court based thereon is so violative of policy terms and the controlling law as to indicate fraud, mistake or misfeasance. In reviewing a judgment entered by a trial court sitting without a jury, we must, of course, leave such issues as the credibility of the witnesses and preponderance of the evidence to the trier of the facts. Therefore, unless we can say the judgment is contrary to the manifest weight of the evidence, it must stand.

The policy issued by defendant limited liability to the (1) actual cash value, (2) cost of repair or replacement, or (3) limit of liability. The latter figure being $3,000.00, the dispute is narrowed to differences of opinion on cash value and cost of repair. Defendant urges that the award was made without regard to cash value and resulted in an award substantially larger than the $1,500.00 cost of the vehicle, purchased used by plaintiff in 1950.

The evidence shows that tank-trucks, such as involved in this controversy, cannot be purchased new because not so manufactured; that they must be assembled; that plaintiff kept this truck and all its parts in excellent repair and replaced worn parts when necessary; and therefore the value may be wholly unrelated to the year it was assembled or to the used purchase price. The care and maintenance given the truck and the condition of the tires and other equipment have more to do with its value than do age or cost.

Defendant's appraiser placed the cash value, that is, what it would bring at retail, at $800.00, though he admittedly was unacquainted with the condition of the truck and had never seen it. This was properly discounted by the umpire and the trial court. The policy did not provide for payment of the cash value of the average 1946 truck in the event of loss, but the value of this particular truck. Plaintiff's appraiser's estimate of cash value of $4,000.00, though he also had not observed the truck closely beforehand, was likewise entitled to little weight. Obviously, in the case of an unusual vehicle, such as a tank truck, the cash value is an elusive concept, comparable equipment is difficult to find, and, therefore, opinions will be widely divergent. The policy, therefore, provides that in the event the appraisers appointed by the respective parties fail to agree, their differences shall be submitted to an umpire. There is no requirement that estimates of cash value be submitted in writing by the appraisers or that the umpire's award must separately state such value. There is evidence that estimates of cash value were submitted by the appraisers and that the umpire's award, based on replacement value, fell within the extremes of such estimates of fair cash value. While the abstract does not show it, the umpire was engaged in a competing business to plaintiff, used tank-trucks in his business and was qualified to express an opinion on value. He testified that the fair cash value

of plaintiff's truck prior to the accident was about $2,900.00.

Therefore, under the circumstances detailed by the evidence in this case, we cannot say that the procedure followed was contrary to policy terms in any material respect or that the judgment entered by the trial judge was contrary to the manifest weight of the evidence. There was competent, though disputed, evidence in support of such award. Any revision by this court in response to the urgings of defendant would be a mere substitution of our conclusion for that of the trier of facts. Somewhere between the cash value estimate of $800.00 and the replacement figure of $1,500.00 submitted by defendant, and a cash value estimate of $4,000.00 and replacement figure of $2,930.00 submitted by plaintiff lies the answer. Because that answer determined in turn by the umpire and trial judge more nearly accorded with plaintiff's estimates, defendant will not now be heard to complain that the procedure followed did not comply with its interpretation of policy provisions.

We conclude, therefore, that the judgment entered by the trial court was supported by competent evidence and should stand.

Judgment Affirmed.

Culbertson, P. J., and Scheineman, J., concur.

~~Publish abstract.~~

40 A

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

February Term, A. D., 1958

Term No. 58-F-19. Agenda No. 20

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FIRST NATIONAL BANK OF CLAYTON, A Corporation, PLAINTIFF-APPELLANT, VS. KENAN F. LOWERY, DEFENDANT-APPELLEE.	Appeal from the City Court of East St. Louis, Illinois

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BARDENS, J.

Plaintiffs sued the Defendant in the City Court of East St. Louis in an action in replevin to recover possession of a 1956 Chevrolet four door hard top automobile. Trial was had in the lower court and all facts were presented upon a stipulation of facts entered into between the parties. At the conclusion of the trial the Court found in favor of the defendant, finding that the specific chattel was not wrongfully detained and that the requisite demand was not made of defendant by plaintiff for the possession prior to the institution of suit. Plaintiff appealed from the judgment of the court ordering return of the property to the defendant. Appellee has filed no brief in this court.

The stipulation of facts recited that plaintiff is a corporation duly qualified in the State of Missouri and authorized to do banking business in said state; that George Croft operated a car lot and sold cars in the city of St. Louis, Missouri; that the whereabouts of Mr. Croft is at present unknown

and he can not be located for the purpose of this action; that Mr. Samuel Crumpton was, and is, a resident of the city of St. Louis, Missouri, and the defendant was, and is, a resident of the city of East St. Louis, Illinois; that on or about September 5, 1956, Crumpton purchased the car in question from Croft in the city of St. Louis; that Crumpton signed a note and chattel mortgage on the car to Croft and that for value received said chattel mortgage was assigned to the plaintiff; that plaintiff filed the mortgage for record in the office of the Recorder of Deeds in the City of St. Louis, Missouri, on September 7, 1956, and notified Crumpton to make the monthly payments on the mortgage to the plaintiff; that Crumpton made the first monthly payments on October 2, 1956, and thereafter, upon his intention to be readmitted to the Veterans' Hospital, left the car in the lot of Croft in St. Louis with the understanding that the car was to be kept in the lot owned by Croft during Crumpton's stay in the hospital; that Crumpton did not give Croft any kind of authority to sell the car; and that while Crumpton was in the hospital Croft sold the car in question to the defendant in St. Louis and the car was taken by the defendant to East St. Louis, Illinois.

The stipulation then goes on to say:

> "The Plaintiff, The First National Bank of Clayton, received notice, approximately 3/1/57, that possession of the car had been surrendered the previous October 9, 1956, and that it had been sold to Mr. Lowery

> who took possession and removed said car to East St. Louis, Illinois. Thereafter on March 15, 1957, the Plaintiff notified the Defendant that the car belonged to the Plaintiff by virtue of the note and chattel mortgage but the Defendant, Lowery, refused to release possession and the Plaintiff instituted the present replevin in suit.

The mortgage provided for an insecurity clause as well as clauses against removal of the vehicle from the City of St. Louis and authorized the mortgagee to foreclose the mortgage and retake possession.

No question seems to have been raised of the right of the mortgagee under a chattel mortgage, duly and properly recorded, to assert his lien and security in the state where it is recorded or in the State of Illinois. Bailey v. Godfrey et al., 54 Ill. 507.

As to the question of a proper demand for possession prior to suit, we think the fair import of the stipulation entered into implies a demand and refusal. Otherwise, the stipulation would have had no occasion to have recited that the defendant refused to release possession of the car to the plaintiff. Furthermore, in Illinois it is not necessary that a demand be served when it is clear that the demand would be unavailing and a wholly useless act. Barnes Scale Co. v. Rose, 257 Ill. App. 92; Automobile Service Corp. v. Community Motors, Inc., 312 Ill. App. 263, 38 NE 2d 512. As was said in Barnes Scale Co. v. Rose, "The object of a demand is to afford the defendant an opportunity to restore the property to the one entitled to possession without being

put to the expense and annoyance of litigation but where it appears that the defendant either before the action was instituted or upon the trial contests the plaintiff's rights upon the merits, or where it appears that a demand would have been of no avail, then none is required, for the law never requires the doing of a useless thing."

The judgment of the lower court is reversed and remanded with directions to that court to award judgment in favor of the plaintiff.

Reversed and remanded.

Culbertson, P.J., and Scheineman, J., concur.

~~Publish Abstract only.~~

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1958

Term No. 58-F-13

Agenda No. 14

JUNIOR OLDEN HOLMES, Plaintiff - Appellee,	)	Appeal from City Court of East St. Louis, Illinois.
-vs-	)	
UNION HOUSE FURNISNINGS COMPANY, Now LASKY ENTERPRISES, INC., Defendant - Appellant.	)	

CULBERTSON, P.J.

This is an appeal from a judgment entered in the City Court of East St. Louis in favor of Plaintiff, JUNIOR OLDEN HOLMES, and against defendant, UNION HOUSE FURNISHINGS COMPANY, now LASKY ENTERPRISES, INC. The action was instituted by plaintiff as against defendant furniture company to recover damages occasioned by an alleged illegal service of a wage assignment upon Swift & Company, the employer of plaintiff.

The defendant is a retail furniture store located in East St. Louis, and in 1953 plaintiff had assumed obligations of a certain prior purchase of furniture upon which there was a balance payable of $852.50. On August 3, 1954 plaintiff was adjudicated a bankrupt in

the United States District Court for the Eastern District of Illinois. He scheduled the defendant's obligatinn and obtained a discharge in bankruptcy on October 22, 1954. As a result of transactions undertaken by the predecessor of plaintiff certain merchandise was repossessed by defendant, but other merchandise was missing, and in response to demand made by defendant, plaintiff stated he had never received the items. Defendant contended a wage assignment was signed by plaintiff, but plaintiff denies he ever signed such wage assignment. On trial of the case in the presence of the Court and jury, plaintiff signed his name as a means of showing that such assignment was not executed by him.

The wage assignment in question was exhibited at Swift & Company and demand was served on February 25, 1955 and on April 29, 1955. On April 29, 1955 plaintiff was discharged from his employment at Swift & Company because of excessive wage assignments. The policy of Swift & Company in regard to wage assignments was to warn an employee on the first wage assignment, to suspend him on the second service of a wage assignment, and to discharge him on the third service of a wage assignment. The record shows that before his discharge plaintiff had earned about $75.00 a week. His continuous employment had started on June 16, 1952. After his discharge plaintiff drew unemployment compensation totaling $600.00, and on December 1, 1955 went to work at a Service Station for three months where

he earned $20.00 a week, and then worked in March and April, 1956 driving a cab for $30.00 a week. On April 25, 1956 he was employed at a brick company in Galesburg, earning approximately $74.00 a week.

As indicated in the course of this opinion the plaintiff's action was predicated on what was determined by the jury as an improper and illegal service of a wage assignment upon his employer, which action caused him damages through loss of his job. He denied the signing of the wage assignment and the jury concluded that he had not in fact signed such wage assignment. The previous wage assignment had been discharged in bankruptcy so the jury concluded there was no valid basis for service of the wage assignment.

Illegal interference with the relationship of employee and employer which results in a discharge from employment confers a right of action on the employee (LONDON GUARANTEE CO. vs. HORN, 206 Ill. 493; GIBSON vs. FIDELITY & CASUALTY CO. 232 Ill. 49). There was a right of recovery for the wrongful act in serving the wage assignment in the instant case since the jury concluded that such wage assignment was not signed by plaintiff and since the consequence of the service of such wage assignement was obviously the loss of his job by plaintiff.

Defendant, on appeal in this cause, contended that there was reversible error by reason of the fact that the defendant's credit manager was called for cross examination under section 60 of the Civil Practice Act.

This same individual was later called by defendant and testified in its behalf. Under such circumstances the calling of such witness would not constitute reversible error (SHAPLEIGH HARDWARE CO. vs. ENTERPRISE FOUNDRY CO., 405 Ill. App. 180).

Another contention made was that there was a variance between the pleadings and the proof. No objection was made at the time of trial nor was there a motion for a directed verdict (MORGAN vs. MIXON MOTOR CO., 10 Ill. App. 2d 323). In the instant case under the amended pleadings the cause was properly submitted and there was no variance which would justify reversal. We also find that the verdict of the jury was supported by the evidence.

The judgment of the City Court of East St. Louis will, therefore, be affirmed.

Affirmed.

Bardens, J., and Scheineman, J., concur.

~~Publish Abstract Only.~~

58 F 5

In the

APPELLATE COURT OF ILLINOIS

Fourth District

February Term, 1958

17 I.A. 2d 289

Vetress Coatie, Administrator of the Estate of William Harris, Dec'd, Plaintiff-Appellant,	Appeal from the
vs.	Circuit Court of
George Kidd, et al, Defendants-Appellees.	Alexander County

Hon. Clarence E. Wright, Presiding Judge

Scheineman, J.

The plaintiff filed this suit against five defendants alleging a tort liability. All five defendants appeared and filed motions to dismiss or strike the complaint. The motions were heard and allowed, and, as part of the same order, the plaintiff was granted leave to file an amended complaint.

Three weeks later plaintiff's attorney filed a motion for extension of time of thirty days, and a few days later the motion was allowed. This order, entered August 2, 1956, contained the following provision: "the motion for extension of time to plead is hereby granted, and the plaintiff is given 30 days from this date to plead." Nothing was filed during the time fixed, nor was there any subsequent request for additional time, or for leave to file an amended complaint after the time fixed had expired.

Some months later three defendants filed motions to

dismiss the suit, setting forth the above facts. Notice of hearing was given, and, on the day specified, the other two defendants asked and were given leave to file similar motions. On the same day, the plaintiff filed an amended complaint without leave of court. At the hearing on the motions, the court gave plaintiff's attorney leave to file an affidavit showing why pleadings were not filed as ordered on August 2nd. This was done and, after consideration thereof, the court allowed the motions of defendants, and entered judgment dismissing the suit at plaintiff's costs. This appeal followed.

It is plain that the final action of the trial court was based on the fact that plaintiff had not complied with the conditions as to time in the order of August 2nd, and no satisfactory excuse for non-compliance had been shown. Yet the plaintiff's brief contains no reference to any authority on the question of the validity or effect of an order fixing a time limit for the filing of an amended complaint. The argument, in general, is that the court abused its discretion in dismissing the suit less than a year after it was filed; and, second, that the court has no authority to dismiss for failure to file the pleadings, unless it has first entered a "rule" on plaintiff to file by a certain time.

On the first point there are cited many cases which discuss the general discretion of a court to dismiss a suit for various reasons, such as delay in serving summons, and delay in proceeding to trial after issue is joined. We do not consider these cases in point on the question of failure to comply with an order fixing a time limit to plead. Naturally, a much longer time is allowed to proceed

to trial than in getting a case at issue.

As for the necessity of entering a "rule" on plaintiff to plead, references are made to special situations arising under the old common law pleading system, or special statutes, none of which exists today. For example, the case of White v. Hogue, 18 Ill. 150, is cited and quoted. That was an attachment suit under a statute which provided that a declaration should be filed during the same term the suit was started. The trial court dismissed the case during the term in which it was filed. On appeal it was held that the trial court had discretion to enter a rule on plaintiff to file a declaration by a day certain, but without the rule, the court had no authority to dismiss during that term, since the law gave plaintiff a right to file his declaration at any time up to and including the last day of the term

That case rests squarely on the fact that plaintiff had a right to file within a time fixed by law. No such right exists in a plaintiff whose complaint has been dismissed on motion. It is uniformly held in such cases that the plaintiff has no right to file an amended complaint except by leave of court. Aaron v. Dausch, 313 Ill. App. 524; Streich v. General Motors Corp., 5 Ill. App. 2nd 485; Davidiris v. National Bank of Mattoon, 6 Ill. App. 2d 286; Deasey v. City of Chicago, 412 Ill. 151.

If the defects are curable by amendment, leave to amend is granted as a matter of course. When a defendant's motion attacking a complaint is overruled the form of the order is to direct or require that he plead by a certain date. Sup. Ct. Rule 101.8. If the motion is sustained, the plaintiff is not directed or required to do anything.

If he is permitted to amend at all, the customary form of order is to grant leave to amend. Frequently the same order or a later order, fixes a time limit for filing the amendment. This practice is approved by courts of review as shown by the following quotation in a case where the time had expired and plaintiff had asked leave to file later:

"The usual practice, upon sustaining a demurrer to a bill of complaint of this character, is to allow amendments as a matter of course, upon such terms as the court may deem proper, and within such reasonable time as may be fixed by the court as was done in this case. Here, the appellant failed to make his amendment within the time prescribed, and the dismissal of the bill would follow as a matter of course. The application was for affirmative exercise of the discretion of the chancellor in appellant's behalf." Dismissal was affirmed. Campbell v. Powers, 139 Ill. 128.

A somewhat similar dismissal was affirmed without much comment in Cook v. Ramsay, 322 Ill. App. 671. That case is largely concerned with the question whether the defect could be cured by amending the complaint. See also 71 CJS Sec. 282, p. 599, and 41 Am. Jur. Sec. 296, p. 425.

The procedure both at law and in chancery is covered in the Practice Act. Section 45, as to general motion practice with respect to pleadings, including a motion to dismiss. Sub-section 4 provides: "After rulings on motions, the court may enter appropriate orders either to permit or require pleading over or amending," etc. The words

"permit or require" cover the two different results which may follow from disposition of the motion.

In our opinion it would not be appropriate for a court to require that plaintiff must file an amended complaint, for he has the right to abandon his suit if he so desires. It is appropriate to "permit" amendments to the complaint, and to fix a reasonable time limit. No question of reasonableness is raised in this case, since plaintiff obtained exactly what he requested.

We conclude that the time limit in an order granting leave to amend is not a nullity. It would be made a nullity if courts of review should hold it an abuse of discretion to dismiss a suit when the amended complaint is not filed in the time fixed. We also hold the court is not required to enter another order fixing a new time limit before dismissing the suit. Accordingly the judgment is affirmed.

Judgment Affirmed.

Culbertson, P. J., and Bardens, J., concur.

~~Abstract~~

Publ. in Abstract

Gen. No. 11123 Agenda 6

17 I.A.2d 290

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(Second Division)

OCTOBER TERM, A. D. 1957

In the Matter of the Conservatorship of ELAINE SENESAC, Incompetent,	)
ARTHUR LAMBERT, Executor of the Estate of Elmire Senesac, deceased,	)
Appellant,	) Appeal from the Circuit Court of Kankakee County, Illinois
vs.	)
RAYMOND T. SENESAC,	)
Claimant-Appellee.	)

Solfisburg--J.

Raymond T. Senesac, a funeral director, filed a claim in the County Court of Kankakee County, Illinois, against the estate of Elmire Senesac, Incompetent, for the funeral of her sister, Emma Senesac. The claim was disallowed by the County Court, but on appeal, the Circuit Court of Kankakee County allowed the claim as a claim of the fifth class against the estate of Elmire Senesac, deceased, Elmire having died during the litigation and her Executor having been substituted as a party defendant. In both courts the matter was tried without a jury.

The facts may be briefly stated. Emma Senesac and Elmire Senesac were both elderly spinsters. Emma had been a charter member of St. John the Baptist Society, which was apparently a fraternal society authorized to issue insurance policies upon the lives of its members. For many years, Emma had paid premiums on a $500.00 life insurance policy on her life until she reached the point when she had no money and could no longer afford the monthly assessments. At that time, Emma had sufficient money paid in premiums, so that she was entitled to a paid-up policy of $460.00. According to the testimony of Mrs. Trudeau, agent for the Society, Emma asked to make the policy on her life payable to Raymond Senesac, the claimant funeral director, to cover her funeral expense. Mrs. Trudeau testified that she advised Emma that the Society required that the beneficiary of a policy be a blood relative of the insured and that Emma agreed that the named beneficiary in the policy should be Elmire. Emma insisted, however, that the proceeds of the policy would be for her funeral and Mrs. Trudeau wrote on the policy - "for funeral expenses". At the time of Emma's death, Elmire was under conservatorship and the proceeds of such policy, amounting to $417.00, were paid to Elmire's conservator, who was also the conservator of Emma Senesac.

Thereafter, the claimant filed his claim for funeral expenses for Emma Senesac against the estate of Elmire Senesac, incompetent, in the amount of $419.86, which claim was disallowed by the County Court. The matter was thereupon appealed to the Circuit Court where, after the executor of the estate of Elmire Senesac was substituted as a party defendant, the matter proceeded to hearing. The evidence hereinabove summarized was adduced by the claimant. The defendant offered no evidence. The Circuit Judge upon

hearing allowed the claim in the amount of $417.00 as a claim of the fifth class against the estate of Elaire Senesac, deceased, (Ill. Rev. Stats. 1955, Chap. 3, Sec. 354) as "money and property received or held in trust by decedent which cannot be identified or traced."

The amount of the claim is not in controversy. The only question raised by the appellant, executor of the Estate of Elmire Senesac, deceased, is whether the claimant funeral director sustained the burden of proving by clear and convincing evidence that Emma Senesac, the insured, had created a valid parol trust of the insurance proceeds for the benefit of Raymond Senesac to cover her funeral expenses. The trial judge held that a trust had been sufficiently established.

It is not unusual for an insured to make arrangements with the beneficiary of life insurance to pay the proceeds thereof in whole or in part to a third person. The Illinois reports contain several such instances, perhaps the earliest of which is found in Otis V. Beckwith, 49 Ill. 121. More recent is the case of Modern Woodmen v. Kyquist, 193 Ill. App. 210, writ of error dismissed in 271 Ill. 635, and Garnett v. Mutual Life Insurance Co., 356 Ill. 612. An extensive annotation appears in 102 A.L.R. 588, et seq.

It is conceded by counsel that a voluntary oral trust concerning personal property may be established and enforced provided proper proof thereof is made. The proof required demands that the acts or words relied upon must establish clearly and convincingly not only the existence of the trust but also its essential terms and conditions, Schaack v. Reiter, 372 Ill. 328, Harris Trust and Savings Bank v. Morse, 238 Ill. App. 232. Further, it is well established that claims against deceased persons must be scrutinized with care, In re Estate of Busse, 332 Ill. App. 258.

The general requirements for establishing a trust of a life insurance policy were set forth by the Supreme Court of Illinois in the case of Garnett v. Mutual Life Insurance Co., 356 Ill. 612, where the court at pages 617-18 of its opinion stated:

> "A trust is an obligation arising out of a confidence reposed in a person, for the benefit of another, to apply property faithfully and according to such confidence. (Lewin on Trusts, 13th ed.) p.12; 1 Perry on Trusts, (7th ed.) sec. 2; Marble v. Marble, 304 Ill. 229) It may be created in any property, real or personal, legal or equitable, which is in existence, and which in the eye of a court of equity, is of value. (1 Perry on Trusts, (7th ed.) secs. 67,68; Burke v. Burke, 259 Ill. 262; Crum v. Sawyer, 137 id. 443.) Choses in action, contingent interests and expectancies may be assigned and a valid trust created in them. Although notassignable at law, they may be transferred, so as to be binding in equity, by a contract made in good faith and for a valuable consideration. (2 Story on Eq. Jur. (13th ed.) sec. 1040b; 1 Perry on Trusts (7th ed.) secs. 67,68; Jarvis v. Binkley, 206 Ill. 541; Hodgsall v. Rem, 183 id. 486; Crum v. Sawyer, supra; Kerr v. Crane, 212 Mass. 224.) To constitute a valid trust of personal property there must be a declaration by a person competent to create it, a trustee, designated beneficiaries, a certain and ascertained object, a definite fund or subject matter, and its delivery or assignment to the trustee. Godefroi on Trusts, (5th ed.) p.7; Gruwys v. Colman, 9 Ves. 319; Brown v. Spohr, 120 N.Y. 201; Johnson v. Scott, 137 N. Y. Supp. 743; Gough v. Butterlee, 52 id. 492.
>
> "A life insurance policy is property and may constitute the subject matter of a trust. (Fortescue v. Barnett, 3 Mylne & Keen, 36; Otis v. Beckwith, 49 Ill. 121; Hirsh v. Auer, 146 N. Y. 13; Lauterbach v. New York Investment Co. 117 N. Y. Supp. 152; Rose v. Maury, 112 N. J. Eq. 62; Kendrick v. Ray, 173 Mass. 385; Coyne v. Supreme Conclave, 106 id. 54.) The designated beneficiary of the policy may, by the provisions of a collateral trust agreement, be named as the trustee. (Vance on Insurance, (2d ed.) p. 606). When the beneficiary promises the insured to pay either the whole or a portion of the proceeds of the policy to a third person, the proceeds will be impressed with a trust to the extent of the promise made. Hirsh v. Auer, Supra; Rose v. Maury, supra; Coyne v. Supreme Conclave, Supra."

Emma Senesac was a woman in her eighties without children and without funds. Her only apparent remaining relative was her sister, Elmire, also a spinster and also elderly. Desirous of making sure that the proceeds of the policy in question were used for her funeral expenses, she and her sister went to the offices of the representative of the insurance company.

Emma Senesac told the company representative that she desired to make the policy payable to the local funeral director to cover her funeral expenses, and when told that the Society required that the beneficiary be a blood relative, she suggested that her sister be named beneficiary. Elmire Senesac, her sister, was present and plainly acquiesced in the arrangement, whereupon the insurance representative wrote on the policy "for funeral expenses". The terms of a valid parol trust must include a proper trust res, a beneficiary or beneficiaries, and a sufficient description of the beneficiary's interest and the manner in which the trust is to be executed. There is no particular formality required in the formation of a trust so long as the requirements enumerated have been shown by clear and convincing evidence. Here there can be no doubt but that the requirements enumerated have been fully met. The trust property or res was the life insurance policy of the St. John the Baptist Society on the life of Emma Senesac; the beneficiary of the trust was the funeral director who would undertake the arrangements for the funeral of the insured; the nature of the beneficial interest would be that the beneficiary would be entitled to the proceeds of the policy upon completing arrangements for the insured's funeral; the manner in which the trust should be executed was by performing the services required for the funeral.

This case was tried before the court, without a jury, and as a court of review, we will not substitute our findings of fact for the findings of fact of the trial court, unless the judgment is clearly against the manifest weight of the evidence. As a reviewing court, we will accept the findings of the trial judge upon questions of fact, based upon the statements of witnesses whom he saw and heard testify, unless such findings are clearly and palpably erroneous, Floyd v. Estate of Smith, 320 Ill.App. 171.

Tested by the well settled principles outlined above, we conclude that the evidence in this case is sufficient to sustain the judgment of the trial judge and that the judgment in this case is just and proper. The intention of Emma Senesac that the proceeds of the life insurance policy on her life should be used to meet the cost of her funeral expenses is clear, and the evidence is sufficient to establish that Emma Senesac established a parol trust for that purpose. Accordingly, the judgment of the Circuit Court of Kankakee County is affirmed.

Judgment affirmed.

Wright, J. Concur.

CROW, P.J. and WRIGHT, J. Concur

Abstract

A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A. D. 1958.

General No. 10153

Agenda No. 9

171 I.A. 291

Roy Thompson, as Administrator of the estate of Fred Thompson, Deceased, and Ruth Thompson,

Plaintiffs-Appellants,

vs.

Kenneth Bailey, a minor,

Defendant-Appellee.

# # #

Kenneth Bailey, a minor,

Counterclaimant-Appellee,

vs.

Roy Thompson, as administrator of the estate of Fred Thompson, Deceased,

Counterdefendant-Appellant.

Appeal from the Circuit Court of Douglas County.

REYNOLDS, J.

This case arises out of a collision between two automobiles at an open country intersection in Douglas County, Illinois. Both roads were improved, adequate for two lane traffic and semi-hard surfaced. Plaintiff's Intestate, Fred Thompson, was driving his automobile in an easterly direction approaching the intersection on the east and west road. The defendant and counter-plaintiff, Kenneth Bailey, was driving his automobile in a northerly direction approaching the intersection on the north and south road. The collision occurred in the center of the intersection. Both drivers were alone, and each had an unobstructed view of the intersection and the other automobile for at least one hundred yards. The collision occurred in broad daylight, the pavement was dry, and no other vehicles were involved in the accident. The plaintiff's intestate was killed instantly.

Suit was instituted by the administrator of the Estate of Fred Thompson, Deceased, and by Ruth Thompson, widow of Fred Thompson, Deceased, against the defendant and counter-plaintiff Kenneth Bailey. Bailey filed his answer to the complaint and a counter-claim against the Estate of Fred Thompson, Deceased. This counterclaim was in two counts, one for personal injuries and one for damage to his automobile. Trial was had in the Circuit Court of Douglas County before a jury. The jury returned verdicts against the plaintiffs, and for the defendant

This case arises out of a collision [illegible] two [illegible] at an open country intersection in Douglas County, Illinois. Both roads were improved, [illegible] for [illegible] semi-hard surfaces. Plaintiff's intent to [illegible] was driving his automobile [illegible] ing the intersection [illegible] and counter-plaintiff, [illegible] mobile in a northerly direction [illegible] on the north and south road. The collision [illegible] center of the inner coil [illegible] had an unobstructed view [illegible] automobile for at least [illegible] occurred in broad daylight, the pavement wet, [illegible] vehicles were involved in the accident. The plaintiff's intestate was killed instantly.

Suit was instituted by the [illegible] of the intestate [illegible] Fred Thompson, deceased, and by [illegible] Thompson, deceased, against the defendant [illegible] Kenneth Dailey. Dailey filed his answer [illegible] and a counter-claim against the intestate [illegible] This counterclaim was in two counts, one [illegible] and one for damage to his automobile. [illegible] Circuit Court of Douglas County before a jury. The jury returned verdicts against the plaintiff, [illegible] for the [illegible]

Bailey, and verdicts for the defendant-counterclaimant and against the Estate of Fred Thompson, deceased, in the amount of $1240.00 for personal injuries to the counterclaimant, and $736.16 for damages to his automobile. Judgment being entered upon the verdicts of the jury, an appeal has been taken to this court.

The appeal raises two questions. 1. Is the verdict against the manifest weight of the evidence, or as stated in the appeal, are verdicts of a jury which find the defendant-counterclaimant, in the face of the evidence, to have been in the exercise of the care required of a reasonable person, supported by the greater weight of the evidence? 2. Did the court err in rejecting proffered proof of the careful habits of the decedent and refusing their submission before the jury?

In passing on the first question it is necessary to review the evidence. Mary Ann Helmuth, a witness for the plaintiff, testified that she was doing janitor work at the Bagdad School at the time of the collision; that the school is about 600 feet east of the intersection; that she saw the Bailey automobile proceeding north and first noticed it when it was about 250 feet south of the intersection. She estimated the speed at 60 miles per hour. Her testimony was positive on the question that the Bailey automobile struck the Thompson car. She did not observe any slackening of speed on the part of the Bailey automobile as it proceeded towards the intersection. She did not see the Thompson car before it came to the intersection, but did see the two cars just as they collided.

Bailey, and verdicts for the defendants on several issues in
against the claims of Fred Thompson, deceased, in the amount
of $1320.00 for personal injuries or the counterclaims, and
$2346.16 for damage to his automobile. Judgment being entered
upon the verdicts of the jury, at [illegible] has been taken to
this court.

The appellant raises two questions. [illegible]
against the contributory negligence of the deceased, [illegible]
the appeal, are entitled to a [illegible] on the [illegible]
counterclaims, in the [illegible]
the evidence of the case regarded as a [illegible]
supported by the greater weight of the evidence. [illegible]
court erred in rejecting [illegible] of the [illegible]
of the deceased and [illegible]

In passing on this first question [illegible] the evidence, it appears
the evidence. [illegible] the [illegible]
deceased died who was doing [illegible]
at the time of the collision [illegible]
were of the intersection, [illegible] a [illegible]
proceeding north and first realized it was in [illegible]
feet south of the intersection. The [illegible] was [illegible]
60 miles per hour. The testimony [illegible] the [illegible]
that the Bailey automobile struck the Thompson car. The [illegible]
not observe any slackening of speed on the part of the Bailey
automobile as it proceeded towards the intersection. The [illegible]
not see the Thompson car before it came to the intersection,
but did see the two cars just as they collided.

Elva Kaufman was a witness for the plaintiff. She did not see the Thompson automobile before the collision but did see the Bailey automobile, first seeing it about a quarter of a mile south of the intersection as it proceeded north. In her judgment the speed of the Bailey automobile was 60 to 65 miles per hour. This witness observed tire marks on the north and south road, these tire marks being straight for some distance and then turning to the east. She made no estimate as to the length of the tire marks.

Lester Gingerich, a witness for the plaintiff, was with his father, Emery Gingerich, driving north in a wagon. The Gingerich wagon had reached a point about 20 rods north of the intersection when the collision occurred. Lester Gingerich heard and saw the Bailey car about a quarter of a mile south of the intersection. He drove the wagon off to the east on the shoulder of the road, and when he looked back the second time, the cars were just about to collide. In his opinion the speed of the Bailey car was about 70 miles per hour. He also testified that the Bailey car struck the Thompson car and knocked it over into a field to the north east of the intersection.

Emery Gingerich, a witness for the plaintiff, corroborated the testimony of his son, and stated that he heard no horn warning from either car.

Elva Kaufman was a witness for the plaintiff. He did not see the Thompson automobile before the collision but did see the Talley automobile, [illegible] about quarter of a mile south of the intersection [illegible] judgment the speed of the Talley automobile [illegible] miles per hour. Five witnesses observed the [illegible] and south road, those who were with [illegible] distance and then turning to the east. [illegible] as to the length of the tire marks.

Lester Gingerich, a witness for the [illegible], [illegible] his father, Henry Gingerich, drove [illegible] Gingerich wagon had reached a point [illegible] the intersection when the Thompson car [illegible] heard and saw the Talley car round a curve [illegible] of the intersection. He saw the wagon [illegible] the shoulder of the road, and he [illegible] time, the cars were just about to collide. [illegible] the speed of the Talley car was about [illegible] also testified that the Talley car struck the Thompson car and knocked it over into a field on the north side of the intersection.

Henry Gingerich, a witness for the plaintiff, corroborated the testimony of his son, and stated [illegible] warning from either car.

Virginia Bartholomew, a witness for the defendant, did not see the collision or the cars before the collision, but heard the crash and saw the two cars at the intersection. She called the doctor and the ambulance. This witness testified that there were tire marks on the north and south road extending from the middle of the intersection to the south.

Juan Bartholomew, a witness for the defendant, was a boy of eleven years of age, and the son of Virginia Bartholomew. He saw the Thompson car pass his home and estimated the speed at about 40 miles per hour.

Eugene J. Miller, a witness for the defendant, was a deputy sheriff of Douglas County and happened upon the scene of the collision. He stepped off the skid marks on the north and south road and estimated them at 24 feet long. He believed the marks were fresh. He did not recall as to any curve of the skid marks, but believed they were fairly straight.

The testimony of the defendant Kenneth Bailey, which would have been inadmissible in his own behalf, was made admissible by the plaintiff who put into evidence statements made by the defendant at the hospital, shortly after the accident, to representatives of the plaintiff. In these statements, the defendant stated he was driving at his ordinary speed, wasn't in a hurry but could not estimate his own speed or that of the Thompson car. He claimed the decedent Thompson as he

approached the intersection from the west, hesitated for a moment and that he thought he was going to stop, but instead he darted out into the intersection. Bailey claimed the Thompson car hit his car. Bailey also corroborated the fact that the weather was fair and the visibility was good.

Photographs introduced into evidence showed an intersection on level ground, with unobstructed visibility in each direction for at least one hundred yards.

The plaintiff argues that the evidence shows three eye-witnesses testifying positively that the Bailey car ran into the Thompson car. These same witnesses estimate the speed of the Bailey car to be 60 to 70 miles per hour. The only witness as to the speed of the Thompson car was Juan Bartholomew, who estimated it at 40 miles per hour. The plaintiffs base their main argument on the point that because the evidence shows that the Bailey car was going faster than the Thompson car, therefore, the Thompson car was in the intersection first. And following up this contention, that the statutes of Illinois would give the Thompson car the right-of-way in the intersection. Prior to 1953, the Illinois statutes provided as follows:- "Except as hereinafter provided motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left." Section 165, Chapter 95½, Illinois Revised Statutes (1951), as adopted July 9, 1935.

In 1953, the right-of-way statute was amended and as it was in force at the time of the collision, read as follows:-

"(a) The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway.

(b) When two vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right." Section 165, Chapter 95½, Illinois Revised Statutes 1953-1957.

This language is clear and unambiguous. If there is a vehicle in the intersection before another reaches it, the one in the intersection has the right of way. The two sections must be read together, and under the provisions of Section (b) if the two vehicles enter the intersection simultaneously, or within such time as to be almost simultaneous, then the vehicle on the right has the right-of-way.

There is no way of knowing the basis upon which the verdict of the jury is predicated. They may have believed that the defendant-counterclaimant had entered the intersection before the Thompson car entered it. They may have believed that the Thompson car, as stated by Bailey, hesitated, giving him cause to believe that it would stop before entering the intersection, and then the decedent decided that he had time to get across and speeded his car up and got into the path of the Bailey car. They may have disbelieved the eyewitnesses

In 1953, [illegible] was in force at the time of the collision, read [illegible]

"(1) [illegible] shall yield the right-of-way [illegible] the intersection [illegible]

[illegible] vehicle or [illegible] shall [illegible] on the right." [illegible] "Yield" [illegible]

[illegible] vehicle in the [illegible] one [illegible] must [illegible] if the one [illegible] within such time [illegible] on the right was [illegible]

[illegible] verdict of the jury [illegible] that the defendant [illegible] before the "Yield" [illegible] that the "Yield" [illegible] his car was [illegible] intersection, and then [illegible] to get across and [illegible] the path of the Dailey car. They may have disbelieved the [illegible]

as to the speed of the Bailey car. Or the jury may have arrived at their verdicts on other grounds and for other reasons. But our courts have stated many times, that although there is a duty on the part of our trial courts and reviewing courts to grant a new trial where the verdict is against the preponderance or manifest weight of the evidence, these courts have also reiterated so many times that citation of authorities is unnecessary, that the reviewing court must take into consideration that the jury saw and heard the witnesses and its findings on disputed questions of fact should have weight with the court. This rule is stated in the case cited by the plaintiffs, namely, Stevenson v. Byrne, 3 Ill. App. 2d 43. And the courts going further have stated many times that unless the findings are clearly and palpably against the weight of the evidence, the reviewing court will not substitute its judgment as to findings of fact for that of the jury.

In this case, no one testified positively as to which car entered the intersection first. It may well be that because the evidence showed the Bailey car to be traveling faster then the Thompson car, at the time they were both approaching the intersection, that it could be inferred that the Thompson car entered the intersection first, but there is no testimony showing the speed of the Thompson car as it entered into the intersection, and none of the witnesses, except Bailey saw the car just before it entered the intersection. It is true that

as to the speed of the railroad. [illegible]
at their verdicts on other grounds and for other reasons. [illegible]
our courts have erected many bases, that [illegible]
on the part of our trial courts [illegible]
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manifest weight of the evidence, but [illegible]
motivated on any thing that [illegible]
necessary, that the verdict [illegible]
that the jury can not [illegible]
disputed questions of [illegible]
This rule is [illegible]
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further have [illegible]
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of fact for that of the jury.

In this case, as the testimony [illegible]
answer the interrogatories [illegible]
the evidence showed the family [illegible]
the Thompson car, [illegible]
intersection, that it could be inferred [illegible]
entered the intersection first, [illegible]
showing the speed of the Thompson car [illegible]
intersection, and none of the witnesses, except Bailey, saw the
car just before it entered the intersection. It is true the

the boy Duan Bartholomew estimated the speed of the Thompson car at 40 miles per hour as it passed his home, but what happened after that, or how Thompson operated his automobile from the Bartholomew home to the intersection, there is nothing in the evidence except the statements of Bailey. The two people in the school stated they did not see the Thompson automobile until just at the time of the collision. The boy and his father on the wagon did not see the Thompson car until just at the time of the collision. Thus the question as to which car first entered the intersection becomes of prime importance in determining the fault for the collision. The jury evidently felt that the fault lay with the decedent Thompson, as evidenced by their verdicts. By their verdicts the jury passed on this question of fact. On the basis of the evidence in the record, this court does not feel that it would be justified in holding that the verdict of the jury was against the manifest weight of the evidence. If the disinterested witnesses had established that the Thompson car was first into the intersection, their evidence would control, and a new trial would be indicated. But their evidence does not disclose this fact.

It is true that the witnesses for the plaintiff are numerically superior to those of the defendant. But on the basic fact which must govern this case, as to which vehicle had the right-of-way, there is no positive, definite evidence of disinterested witnesses.

The boy then [illegible] testified the speed of the [illegible] at 40 miles per hour as [illegible] after that, or how frequently [illegible] [illegible] testified that he had never [illegible] evidence except the [illegible] the school [illegible] until just at the time of the collision [illegible] on the upper [illegible] time of the collision. [illegible] First crossed the [illegible] determining the [illegible] felt that the [illegible] by their testimony [illegible] question of fact. [illegible] this court does not feel [illegible] that the verdict of the jury was [illegible] of the evidence. [illegible] that the [illegible] evidence would control, and a new trial would be [illegible] But their evidence does not [illegible].

It is true that the witnesses [illegible] numerically, adverse to those of the [illegible]. But in this basic fact which must govern this case, as to which [illegible] the right-of-way, there is no positive, [illegible] evidence of disinterested witnesses.

The second point raised as to the right of the plaintiff to introduce evidence as to the careful habits of the decedent to show due care on the part of the decedent has been decided many times by our courts. If there are no eyewitnesses, such proof is admissible. Stollery v. Cicero Street Ry. Co., 243 Ill. 290; Collison v. Illinois Central Railroad Co., 239 Ill. 532; Chicago and Alton Railroad Co. v. Wilson, 225 Ill. 50; Illinois Central Railroad Co. v. Nowicki, 148 Ill. 29. Conversely, if there is an eyewitness, such testimony is inadmissible. Petro v. Hines, 299 Ill. 236; Ingle v. Maloney, 234 Ill. App. 151; Scally v. Flannery, 292 Ill. App. 349; Elliott v. Elgin, J. & E. Ry. Co., 325 Ill. App. 161. Here there was an eyewitness. While it is true, he was the defendant and counterclaimant, the plaintiffs themselves put his testimony in the record and for the purpose of establishing the acts of the decedent, his evidence is proper. His testimony as to acts of the decedent was incompetent, but the act of putting his statements into the record by the plaintiffs rendered his testimony competent, thus making him an eyewitness. And because he is the defendant does not change the fact that he was an eyewitness and because of that fact testimony as to the careful habits of the decedent are inadmissible. Petro v. Hines, 299 Ill. 236. In the case of Scally v. Flannery, 292 Ill. App. 349, a similar situation arose. The defendant was called as a witness by the plaintiff and testified as to the facts regarding the

injury, the defendant being an eyewitness. And the court in that case in passing on whether evidence as to careful habits should have been admitted, said; "We think the trial court should have sustained the objection, as the defendant, called by plaintiff, testified as an eyewitness, and hence no necessity existed for the resort to such evidence."

The judgment of the Circuit Court will be affirmed.

Affirmed.

injury, the defendant being an eyewitness. And the court in that case in passing on whether evidence as to certain habits should have been admitted, said: "We order the trial court should not sustained the objection, on the statement, coupled by plaintiff, testified as an eyewitness, and hence be necessarily subject for it resort to such evidence."

The judgment of the trial court will be affirmed.

Affirmed.

as to the speed of the Bailey car. Or the jury may have arrived at their verdi ts on other grounds and for other reasons. But our courts have stated many times, that although there is a duty on the part of our trial courts and reviewing courts to grant a new trial where the verdict is against the preponderance or manifest weight of the evidence, these courts have also reiterated so many times that citation of authorities is unnecessary, that the reviewing court must take into consideration that the jury saw and heard the witnesses and its findings on disputed questions of fact should have weight with the court. This rule is stated in the case cited by the plaintiffs, namely, Stevenson v. Byrne, 3 Ill. App. 2d 43. And the courts going further have stated many times that unless the findings are clearly and palpably against the weight of the evidence, the reviewing court will not substitute its judgment as to findings of fact for that of the jury.

The right and duty of the trial judge to grant a new trial is reviewed in a well reasoned opinion in the case of Read v. Friel, 327 Ill. App. 532. In that case, the trial court in passing on a motion for a new trial said: "I have carefully considered the weight of the evidence, the credibility of the witnesses, and I still refuse to grant a new trial." And the reviewing court in commenting on this statement of the trial judge, said: "Obviously the trial judge, under the law, is not warranted in granting a new trial merely because he thinks the verdict should have been for the other party. He must also take into consideration the fact that the jury saw and heard the witnesses, and found contrary to his impression, but it is his duty, as we pointed out in the former opinion, to consider the verdict of the jury in passing on the motion for a new trial."

as to the speed of the alley car, [illegible]

at their verdict is an obvious [illegible]

our courts have stated many times, that [illegible]

on the part of a trial judge in [illegible]

new trial where the verdict is [illegible]

manifest weight of the evidence, [illegible]

referred to many times in [illegible]

necessary, the [illegible]

that the jury [illegible]

disputed [illegible]

this [illegible]

J. Vernon v. [illegible], 2 Ill. [illegible]

further [illegible]

clearly [illegible]

reversing [illegible]

at least in that [illegible]

The right [illegible]

trial is reversed [illegible]

Deed v. Irion, 227 Ill. [illegible]

court in passing [illegible]

carefully considered [illegible]

of the witnesses, and [illegible]

and the reviewing court [illegible]

trial judge, and [illegible]

is not warranted in [illegible]

the verdict should have been [illegible]

take into consideration [illegible] that the jury [illegible]

witnesses, and found it necessary to hold in recent [illegible]

duty, as we pointed out in the same opinion, to [illegible]

verdict of the jury in passing on the motion for a new trial."

Page 538 of the opinion. And in that case, the court continuing, on page 542, after again quoting the language of the trial court in refusing to grant a new trial, said: "In these circumstances we are not warranted in disturbing the verdict unless we are of opinion that it is against the manifest weight of the evidence. In our former opinion, after stating the law on the question of directing a verdict, we said: 'But after the verdict is returned a different question arises. It is then the duty of the trial judge to consider the weight of the evidence and if he is of opinion that plaintiff has not proven his case by a preponderance of the evidence, taking into consideration the fact that the jury has found otherwise, it is his duty to set aside the verdict and grant a new trial. And if the court does not do so but overrules the motion and enters judgment and the case is then brought to this court, we are not authorized to disturb the verdict on this ground unless the verdict and judgment are against the manifest weight of the evidence. This court in passing on the question must take into consideration not only the verdict of the jury but the fact that the trial judge saw and heard the witnesses, overruled the motion for a new trial and entered judgment. It requires much more for this court to set aside a verdict and judgment than is required of the trial judge'."

[illegible]

And our courts have gone even further in passing on the question of whether or not the trial court or the reviewing court should set aside a verdict of a jury on the ground that it is against the manifest weight of the evidence. In the case of Casey v. Burns, 7 Ill. App. 2d, 318, at page 322, that court said: "On this record we are not concerned with the weight or credibility of the evidence. Reasonable inferences may be drawn by a jury from established facts, and a verdict may not be set aside merely because the jury could have drawn different inferences from the evidence. Only where there is a complete absence of probative facts to support the conclusion drawn by the jury is it reversible error to overrule a motion for judgment notwithstanding the verdict." And while this language of the court in that case is one treating the law as to a motion for judgment notwithstanding the verdict or for new trial, the reasoning is applicable to this case.

In this case, no one testified positively as to which car entered the intersection first. It may well be that because the evidence showed the Bailey car to be traveling faster than the Thompson car, at the time they were both approaching the intersection, that it could be inferred that the Thompson car entered the intersection first, but there is no testimony showing the speed of the Thompson car as it entered into the intersection, and none of the witnesses, except Bailey saw the car just before it entered the intersection. It is true that

the boy Duan Bartholomew estimated the speed of the Thompson car at 40 miles per hour as it passed his home, but what happened after that, or how Thompson operated his automobile from the Bartholomew home to the intersection, there is nothing in the evidence except the statements of Bailey. The two people in the school stated they did not see the Thompson automobile until just at the time of the collision. The boy and his father on the wagon did not see the Thompson car until just at the time of the collision. Thus the question as to which car first entered the intersection becomes of prime importance in determining the fault for the collision. The jury evidently felt that the fault lay with the decedent Thompson, as evidenced by their verdicts. By their verdicts the jury passed on this question of fact. On the basis of the evidence in the record, this court does not feel that it would be justified in holding that the verdict of the jury was against the manifest weight of the evidence. If the disinterested witnesses had established that the Thompson car was first into the intersection, their evidence would control, and a new trial would be indicated. But their evidence does not disclose this fact.

It is true that the witnesses for the plaintiff are numerically superior to those of the defendant. But on the basic fact which must govern this case, as to which vehicle had the right-of-way, there is no positive, definite evidence of disinterested witnesses.

The second point raised as to the right of the plaintiff to introduce evidence as to the careful habits of the decedent to show due care on the part of the decedent has been decided many times by our courts. If there are no eyewitnesses, such proof is admissible. Stollery v. Cicero Street Ry. Co., 243 Ill. 290; Collison v. Illinois Central Railroad Co., 239 Ill. 532; Chicago and Alton Railroad Co. v. Wilson, 225 Ill. 50; Illinois Central Railroad Co. v. Nowicki, 148 Ill. 29. Conversely, if there is an eyewitness, such testimony is inadmissible. Petro v. Hines, 299 Ill. 236; Ingle v. Maloney, 234 Ill. App. 151; Scally v. Flannery, 292 Ill. App. 349; Elliott v. Elgin, J. & E. Ry. Co., 325 Ill. App. 161. Here there was an eyewitness. While it is true, he was the defendant and counterclaimant, the plaintiffs themselves put his testimony in the record and for the purpose of establishing the acts of the decedent, his evidence is proper. His testimony as to acts of the decedent was incompetent, but the act of putting his statements into the record by the plaintiffs rendered his testimony competent, thus making him an eyewitness. The plaintiffs cannot challenge his veracity, because in effect he was their witness. And because he is the defendant does not change the fact that he was an eyewitness and because of that fact testimony as to the careful habits of the decedent are inadmissible. Petro v. Hines, 299 Ill. 236. In the case of Scally v. Flannery, 292 Ill. App. 349, a similar situation arose.

The defendant was called as a witness by the plaintiff and testified as to the facts regarding the injury, the defendant being an eyewitness. And the court in that case in passing on whether evidence as to careful habits should have been admitted, said: "We think the trial court should have sustained the objection, as the defendant, called by plaintiff, testified as an eyewitness, and hence no necessity existed for the resort to such evidence."

The judgment of the Circuit Court will be affirmed.

Affirmed.

Carroll, P. J., and Roeth, J., concur.

47129

BERYL GOOD and EDDIE WILLIAMSON, Appellants,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
CHICAGO PARK DISTRICT, MINTER BENNETT and DAVE SMITH, Appellees.	

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This appeal is taken from a judgment and an order entered in an action brought in the Superior Court of Cook County by the plaintiffs, Beryl Good and Eddie Williamson, to recover damages for personal injuries and property damage sustained by them as a result of the alleged negligence of the defendants Minter Bennett and Dave Smith, police officers of the Chicago Park District, while driving an automobile owned by the Park District and provided by it for the use of the individual defendants. Before trial the court dismissed the Chicago Park District from the action on the ground that the operation and maintenance of its police department is such an exercise of a governmental function which would relieve it from liability for personal injuries or property damage resulting from torts committed by police officers. The action by the plaintiffs against Minter Bennett and Dave Smith was tried before a jury, which returned a verdict in favor of the two defendants. The court denied the post-trial motion of the plaintiffs for judgment notwithstanding the verdict or in the alternative for a new trial. Judgment was entered on the verdict. This appeal is taken from the order of the trial court dismissing the Chicago Park District as a defendant and from the judgment

entered by the trial court on the verdict in favor of Minter Bennett and Dave Smith.

The theory of the plaintiffs is that the defendant Chicago Park District is not entitled to sovereign immunity in this case, that the trial court improperly instructed the jury and refused proper instructions tendered by the plaintiffs, and that the verdict was contrary to the manifest weight of the evidence. We have not been favored with the benefit of a reply brief on the part of the plaintiffs.

From the record it could be found that shortly after six o'clock on Sunday morning, August 2, 1953, plaintiff Eddie Williamson was driving his automobile, with plaintiff Beryl Good as a passenger, north on the Outer Drive at or near 47th Street. It had been raining since before 5:00 a.m. The streets were wet, and one witness testified that the roadway "was very slick." Just south of the overpass at 47th Street the plaintiffs' car was struck by a Chicago Park District squad car assigned for the use of defendant Smith, who was employed by the Park District as a police sergeant, which car was driven by defendant Bennett, a Park District patrolman who had been assigned as Smith's driver. At the time of the collision plaintiffs' car was moving north about 30 miles an hour, along the east curb in a speed zone posted for 35 miles an hour. Bennett and Smith had been driving north on the Outer Drive and intended to turn west at Oakwood Boulevard. As they were crossing over the drive they observed a southbound car traveling at a speed of 60 to 70 miles

car went over the 47th Street overpass he was about a half mile behind it; that the red light on the roof of the car was not flashing, nor did he hear the sound of a siren. He did not notice any change in the speed of the police vehicle from the time when he first saw it and the time when it went over the overpass.

The defendants urge that the propriety of the court's order dismissing the Chicago Park District as a party defendant is not before us for consideration unless we find that the trial court erred in refusing to sustain the plaintiffs' post-trial motion for a new trial. Under the complaint any liability on the part of the Chicago Park District must be based on the doctrine of respondeat superior, and before that doctrine can be invoked the individual defendants Bennett and Smith must be found guilty of a tort. The trial court overruled the post-trial motions of the plaintiffs and sustained the verdict of the jury in favor of the defendants. If the action of the trial court was correct, there is no necesssity to consider whether or not the Park District could have been held liable if the verdict had been otherwise.

The first question to be discussed is whether or not the verdict was against the manifest weight of the evidence.

The duty as to care resting upon a police officer in fresh pursuit of a suspected criminal differs greatly from the duty resting upon other drivers using the public highways. Section 53, Article VI, of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1953, chap. 95-1/2, par. 150) provides that the

established speed limits do not apply to an authorized emergency vehicle responding to an emergency call, but that the driver of such vehicle has the duty to drive with due regard for the safety of all persons using the street and he must not have a reckless disregard for the safety of others. Section 23, Article II (par. 120) provides in part that a driver of any authorized emergency vehicle shall not assume any special privilege except as such vehicle is operated in response to an emergency call or in immediate pursuit of an actual or suspected violator of the law. In Erickson v. Fitzgerald, 342 Ill. App. 223, the court cites with approval Both v. Collins, 339 Ill. App. 437, and says:

> "'* * * In Section 23b it [Uniform Act Regulating Traffic on Highways] excepts drivers of authorized emergency vehicles when responding to an emergency, though it requires caution. In (c) it narrows the exceptions to drivers responding to emergency calls or those in immediate pursuit of actual or suspected violators of law. Police vehicles are included in the definition of Authorized Emergency Vehicles. * * * This comports with reason. Police officers if held to the standards of ordinary prudent men cannot cope with vicious criminals. On the other hand there is no excuse for recklessness in policemen not responding to emergency or not in immediate or fresh pursuit. The common good may require sacrifices to necessary recklessness but it is not served where innocents are sacrificed to unnecessary recklessness.'"

The evidence in the instant case must be considered under the rule laid down in Erickson v. Fitzgerald, supra. There seems to be no contradiction that at the time and place in question Bennett and Smith were police officers driving a squad car and were in fresh pursuit of a law violator. In certain respects the evidence is in conflict. The jury must resolve that conflict. By their verdict they did so resolve it in favor of the defendants.

This court has repeatedly stated the rule with reference to the right and duty of the court to grant a new trial on the ground that the verdict was against the manifest weight of the evidence. To be against the manifest weight of the evidence requires that an opposite conclusion be clearly evident. The matter of granting a new trial is in the sound discretion of the trial court and its ruling will not be reversed except for a clear abuse of discretion. Arboit v. Gateway Transportation Co., 15 Ill. App.2d 500; Robinson v. Workman, 15 Ill. App.2d 25; Ritter v. Hatteberg, 14 Ill. App.2d 548; Stone v. Guthrie, 14 Ill. App.2d 137; Bunton v. Illinois Central R. Co., 15 Ill. App.2d 311; Hulke v. International Mfg. Co., 14 Ill. App.2d 5. We find that the verdict rendered by the jury in this case was not against the manifest weight of the evidence, and the trial court committed no error in refusing to grant the plaintiffs a new trial.

The plaintiffs also urge that the jury was improperly instructed. The jury was given sixteen instructions. Ten instructions given were instructions which had been proffered by the defendants, of which six were cautionary instructions. Three were proffered by the plaintiffs, and the court gave three instructions which he had prepared.

Instruction No. 4 given by the trial judge is one of the instructions objected to by the plaintiffs. The court in the instruction, after informing the jury that the defendants were police officers of the Chicago Park District driving a squad car at the time and place in question, instructed them that the

defendants were not entitled to assume any special privilege in the operation of that motor vehicle at that time and place unless the jury found from a preponderance of the evidence that the police vehicle was being operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law, and if the jury did so find and further found from a preponderance of the evidence that "the defendants were not driving with due regard for the safety of all persons using the street, or that the defendants were driving with a reckless disregard of the safety of others, and that such conduct of the defendants, if you so find, was the proximate and direct cause of the injuries and damages to the plaintiffs, then your verdict should be for the plaintiffs." The plaintiffs object to the wording of the instruction on the ground that it includes the words "reckless disregard of the safety of others," and that it was in effect, in its first paragraph, a peremptory instruction for the defendants. The court had refused plaintiffs' instruction No. 6, but had modified it and given it in substance as the court's instruction No. 4. The portion of the instruction to which the plaintiffs now object as being a peremptory instruction in favor of the defendants was lifted verbatim from the plaintiffs' refused instruction No. 6. The wording of the instruction to which the plaintiffs object is the wording contained in section 53 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1953, chap. 95-1/2, par. 150), which provides: "* * * this provision shall not relieve the driver of an authorized emergency vehicle from the duty to drive

with due regard for the safety of all persons using the street, nor shall it protect the driver of any such vehicle from the consequencesof a reckless disregard of the safety of others." The instruction was a proper statement of the law and could not in any way prejudice the plaintiffs.

The plaintiffs also object to the court's instruction No. 1, which stated that the plaintiffs could not recover if they were injured as a result of an accident occurring "without the fault of the defendants," and also defined "accident" as meaning "an occurrence not occasioned in any degree, remotely or directly, by such want of due care as an ordinarily prudent person would exercise under the same or similar circumstances." While there may be some question as to the value of this instruction in any case, it cannot be said that the giving of it was error where there was evidence in the record from which the jury could infer that the collision might have occurred without the fault of the defendants. Under the circumstances in the case before us, to hold the police officers responsible more than a mere showing of negligence would be necessary, and the speed at which they were driving a squad car must be considered in connection with the fact that they were in immediate pursuit of a law violator, and that the collision was caused because the car struck a dent or depression in the street. From their testimony it might be inferred that the collision was caused without the fault of the defendants.

Defendants' instruction No. 5 instructed the jury that they should not allow sympathy for the injuries of the plaintiffs or

prejudice to influence them in determining either the liability of the defendants or the amount of the verdict, and that their verdict should be free from sympathy or prejudice and without regard to who the plaintiff or defendant was. The giving of an instruction of this type in a suit between natural persons is not proper, but in the form in which it was given it does not constitute reversible error. The instruction does not have the vice of the instructions given in Rogers v. Mason, 345 Ill. App. 560, and Gaffner v. Meier, 336 Ill. App. 44.

Plaintiffs strenuously contend that the court should have given their instruction No. 7, which set out the statute providing that any authorized emergency vehicle may be equipped with a siren, whistle or bell which shall not be used except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law, but that in such cases the driver shall sound the siren, whistle or bell when necessary to warn pedestrians or drivers of its approach, and further instructs the jury that if the jury finds that the authorized emergency vehicle driven by the defendants was equipped with a siren as defined in the statute, and also finds that the vehicle was operating in response to an emergency call or was in the immediate pursuit of an actual or suspected violator of the law, and that the drivers or either of them failed to sound the siren and that it was necessary to do so in order to warn the plaintiffs of their approach, and "that the failure so to do was negligence and was the direct and proximate cause of the injury and the damage to the plaintiffs, then you will find for the plaintiffs." This

was a peremptory instruction. Under the facts in this case the mere fact, standing alone, that the defendants were not sounding the siren on their car would not be sufficient to justify a verdict for the plaintiffs. Failure to give this instruction did not constitute reversible error.

There was no error in the court's giving of instruction No. 15, which required the plaintiffs to show by a preponderance of the evidence that the ailments and disabilities which they claimed to have sustained by reason of the alleged occurrence really existed and that they were a direct and proximate result of the occurrence in question.

Finding no error in the trial of the individual defendants Bennett and Smith it is not necessary for us to pass upon the propriety of the pretrial order of the court dismissing the Chicago Park District from the case as a party defendant. Nor could such dismissal work any prejudice as far as the plaintiffs were concerned in the determination of the issues in their suit against Bennett and Smith as individual defendants.

The order of the Superior Court dismissing the Chicago Park District and the judgment entered upon the verdict in favor of the individual defendants and against the plaintiffs are affirmed.

Affirmed.

Schwartz, P. J., and Robson, J., concur.

Abstract only.

251

A

47227

17 I.A. 2d 413

THE EXCHANGE NATIONAL BANK OF CHICAGO, a Corporation, as Trustee under Trust No. 2264, Z. Albert Joseph and E. Sumner Walker,

Plaintiffs - Appellants,

v.

CITY OF CHICAGO, a Municipal Corporation and GRANT ADVERTISING, INC., a Corporation,

Defendants - Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for a declaratory judgment asking that an amendatory zoning ordinance of the City of Chicago be declared void. The trial court entered judgment on the pleadings in favor of defendants the City of Chicago and Grant Advertising Company, hereinafter referred to as the City and Grant. Plaintiffs, The Exchange National Bank of Chicago as trustee, Z. Albert Joseph and E. Sumner Walker, appeal from this judgment.

The pleadings show that on April 11, 1956, property owned by Grant was rezoned from an apartment house district to a business district and from volume district 3 to volume district 2. The property rezoned and including Grant's property is on the northeast corner of Sheridan Road and Bryn Mawr Avenue and has a frontage of 135 feet on Sheridan Road and a depth to the west line of Lincoln Park of 250 feet. The properties on the southeast and southwest corners of that intersection are zoned for business, the former being occupied by the Edgewater Beach Apartments and having first floor stores and the latter being occupied by a filling station. The property on the northwest

corner was rezoned for business on June 4, 1946, and the remainder of the west side of Sheridan Road, north to Hollywood Avenue, was rezoned as a specialty shop district on September 20, 1950.

Plaintiffs' property has a 50 foot frontage on the east side of Sheridan Road and is located between Thorndale Avenue and Ardmore Avenue, about two and one half blocks north of the Grant property. The property in the same block as plaintiffs' property and in the block just south of plaintiffs' property between Hollywood and Ardmore Avenues is zoned for apartment use.

Plaintiffs contend that the trial court erred in granting defendants' motion for judgment on the pleadings claiming that there were substantial controverted questions of fact as to damages and as to the validity of the amendatory ordinance.

The question presented is whether there is any issue of material fact presented by the pleadings.

A motion for judgment on the pleadings tests the sufficiency of the pleadings as a matter of law, and it admits the truth of all well-pleaded facts in the pleading of the opposite party. Robb v. Eastgate Hotel, Inc., 347 Ill. App. 261, 267. A judgment on the pleadings is proper where, under the conceded facts, a judgment different from that pronounced could not be rendered, for the reason that there is no material issue of fact presented by the pleadings. Lipski v. Schwartz, 5 Ill. App. 2d 577.

Plaintiffs allege that the result of the amendatory zoning ordinance will be to "depreciate the value of the property of plaintiffs and cause a decrease in the taxable value of their real estate" and invite "further breaches and encroachments on the protection of the zoning ordinance which plaintiffs have relied upon."

Plaintiffs have the burden of proving special damages where it is claimed that the corporate authorities have wrongfully permitted a use on the property of someone else. Garner v. County of DuPage, 8 Ill.2d 155, 158-59; Bullock v. City of Evanston, 5 Ill.2d 22, 33, 34. In Winston v. Zoning Board of Appeals, 407 Ill. 588, 594, the court stated: "The allegation that 'the value and use of their property is affected by the granting of the variance' is a mere conclusion of the pleader and, not being supported by allegations of specific facts, was not admitted by the motion to dismiss." Nowhere in plaintiffs' complaint or reply do they allege specific facts to support their general allegation that the amendatory ordinance will "depreciate the value" of their property and cause a decrease in the "taxable value" of their real estate. This very allegation was held insufficient in 222 East Chestnut St. Corp. v. Board of Appeals, 10 Ill.2d 130, 136. The fact that plaintiffs allege that the amendatory ordinance will invite "further breaches and encroachments" and that other "persons have taken steps to acquire property on the east side of Sheridan Road in the 5700 block" with the hope that the property will be rezoned is insufficient to justify the inference that plaintiffs

have been injured. See 222 East Chestnut St. Corp. v. Board of Appeals, 10 Ill.2d 132, 136. We conclude that special damages were not sufficiently alleged.

Moreover, the pleadings fail to overcome the presumption in favor of the validity of the amendatory ordinance in that they fail to show that the amendment is clearly unreasonable, arbitrary and capricious. Bohan v. The Village of Riverside, 9 Ill.2d 561, 567; Bullock v. City of Evanston, 5 Ill.2d 22. The other three corners of Sheridan Road and Bryn Mawr Avenue were zoned for business and were at the time of the rezoning being used either wholly or partially for business purposes. The west side of Sheridan Road between Bryn Mawr and Hollywood Avenues, except for the Bryn Mawr corner which was zoned for business, was zoned for specialty shop uses. The pleadings further show that on the same side of the street and in the same block as the rezoned property there is a church, a parish house and a gymnasium; that in the next block north there is a monastary, a nursing home and a sanitarium; and that in the same block as plaintiffs' property there is an old peoples' home, a nursery school and a nursing home. The foregoing facts militate against a finding that the amendatory ordinance is unreasonable, arbitrary and capricious. See Bohan v. The Village of Riverside, 9 Ill.2d 561. We conclude that the invalidity of the amendatory ordinance was not sufficiently alleged.

We find that there is no issue of material fact presented by the pleadings.

In view of our conclusions we find it unnecessary to pass on the issue as to whether this is a class action.

AFFIRMED.

LEWE AND MURPHY, JJ., CONCUR.

ABSTRACT ONLY.

2

A

17 I.A. 2d 414

47256

VERNON L. PATTERSON, Appellant, v. JACK NICK and BROADWAY BUICK SALES CORPORATION, Appellees.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered on a jury verdict for defendants, in an action based on fraud and deceit.

Vernon L. Patterson, plaintiff, purchased a 1956 Buick automobile from Broadway Buick Sales Corporation, at an agreed price of $4,273.27, and as part payment traded in a used 1954 Buick at an agreed trade-in price of $2565. The 1954 car was encumbered with an unpaid bank loan of $1336, which Broadway Buick assumed and paid, and Patterson was given credit for a net down payment of $1186.27 on his 1956 Buick conditional sales contract, with the $3087 balance payable in monthly installments. Patterson used the 1956 automobile two weeks and then determined it was not an unused new 1956 model but a demonstrator. He claimed he had bargained for a new 1956 automobile and demanded that Broadway Buick give him a new car. This they refused to do, stating he had been told he was purchasing a 1956 demonstrator with a new-car guarantee. Patterson repudiated the contract and brought this action of fraud and deceit, seeking compensatory and punitive damages from Broadway Buick and Jack Nick, the salesman.

On a trial before a jury, Patterson testified that it was represented to him that he was purchasing a new and unused car. Defendants' witnesses denied this and testified he had been told that the car in question had been used as a demonstrator, and claimed that no misrepresentations were made to him at the time of the sale.

The jury returned a verdict for defendants and answered "No" to the following special interrogatory:

> "Did the defendants Jack Nick and Broadway Buick Corporation misrepresent the sale of the Buick automobile in question to the plaintiff Vernon L. Patterson and if so did they act in a wilful, wanton and malicious manner?"

The principal question is whether the trial court committed prejudicial error in admitting, over objection, defendants' evidence showing the actual value of plaintiff's 1954 Buick to be $1350 instead of the trade-in allowance value of $2565.

Plaintiff contends that he was entitled to his bargain, and that his measure of damage was properly based on the agreed trade-in value of $2565 and not the actual value of $1350, and that the court should not have admitted defendants' evidence showing the actual value of his 1954 Buick to be $1350, with the further testimony of Broadway Buick assuming and paying off the $1336 loan on it.

An examination of cases cited by plaintiff indicates the Illinois rule to be that where plaintiff charges fraud, inducing the purchase of property, evidence that plaintiff received his money's worth, notwithstanding the alleged fraud,

is inadmissible, and plaintiff is entitled to the benefit of the bargain which he believed he was making. Drew v. Beall, 62 Ill. 164, 167; Antle v. Sexton, 137 Ill. 410, 416; 19 I.L.P., Ch. 2, §46.

The admission of evidence as to the incorrect measure of damages, if error, was not prejudicial to plaintiff in the instant case, because the jury, by its answer to the special interrogatory, found there was no misrepresentation in the sale of the automobile to Patterson, and also returned a verdict for defendants, thereby eliminating the determination of damages.

It is not claimed that the verdict is against the manifest weight of the evidence, and as we believe the judgment for defendants should stand, it is unnecessary to determine plaintiff's point as to the recoverability of his attorney's fees in this action.

The judgment is affirmed.

AFFIRMED.

KILEY, P.J., AND LEWE, J., CONCUR.

ABSTRACT ONLY.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A. D. 1958

17 I.A. 2d 414

General No. 10167

Agenda No. 16

Louis L. Mason, Claimant-Appellant, vs. Henning J. Hansen, Executor of the Estate of Christen S. Hansen, Deceased, Respondent-Appellee.	Appeal from the Circuit Court of Macon County

Roeth, J.

Plaintiff filed his claim against the estate of Christen S. Hansen on February 28, 1953, in the County Court of Macon County, Illinois, for $6,250.00. The claim in usual form contained the following statement:

> "Claim is for reimbursment of 625 shares of stock. There are 2 certificates, no. 21 dated 3 Sept. '48 for 375 shares in name of Louis L. Mason or Mary Ann Mason; certificate no. 33 for 250 shares dated 6 May, '49 in name of Louis L. Mason or Mary Ann Mason. This claim is based upon written agreement of Christen S. Hansen dated 6 Jan. '50. A true copy of such agreement is attached herewith. Claimant elects to claim for reimbursement under this agreement and upon payment will surrender said 2 certificates of stock totaling 625 shares, which stock was purchased at original value of 10.00 a share, such transfer to be to any person, 6250.00

firm or corporation to be named by the executor."

The claim was based on a written instrument dated January 6, 1950, and signed by C. Hansen and after his name appeared the words "Legal Seal". The instrument, written on the stationery of plaintiff, who is an attorney, was as follows:

> "I hereby agree to pay you the full amount of the total value of the stock which you, Louis L. Mason, have in the Faries Lamp Works, Inc. I understand that you have 625 shares or a total of $6250.00 worth of stock in this corporation. I make this written agreement here, because you put additional money in the company upon my request, over and above your original subscription of $3750.00, and also I have many times verbally stated that you and your family would never lose because of the investments you made in this company at my request and urging.
>
> Dated at Decatur, Illinois this 6th day of January, 1950.
>
> C. Hansen (Legal Seal)"

No pleadings were filed except the aforesaid claim, on the back of which the executor objected to the allowance of the same. The County Court disallowed the claim and an appeal was taken to the Circuit Court of Macon County, Illinois. Only one witness was called who testified on behalf of the plaintiff as to the genuineness of the signature on the instrument and the sound mind of the decedent at the time of the execution of the instrument, which facts are not in dispute. Plaintiff introduced the above instrument in evidence and in open court tendered the stock certificates above referred to in the claim to the executor, who refused to accept them. The lower court

held the instrument was not a promissary note and found that at best it was an offer on the part of the deceased to buy stock from Mason and there not having been an acceptance of the offer or option to buy within a reasonable time and considering that Hansen had died before acceptance, the offer was revoked.

Plaintiff contends the instrument is a nonnegotiable promissary note and further that because the instrument was under seal, consideration is imported. He contends that, first, this is a case at law and therefore no proof can be received to show want of consideration because of said seal, and, secondly, that if this is a suit in equity the seal imports consideration as a matter of fact and not law and there has been no proof to overcome this presumption and that the lower court should have allowed the claim.

The claim upon which suit was brought states "claim for reimbursement". The claim refers to the instrument as an "agreement" and offers to surrender the stock certificates upon payment of $6,250.00, to the claimant by the executor. The claim, while making a demand of $6,250.00, seeks specifically to enforce the agreement. Under these facts we are unable to see how this could be construed to be other than a proceeding of an equitable nature. No allegation was made, nor was any proof offered, to show Hansen ever breached the agreement, nor was proof offered that tender of the stock was ever made to Hansen. Had the plaintiff brought this suit against Hansen during the latter's

lifetime asking for the same relief, such relief as he now requests would have to be obtained in a court of equity. This is not to say, however, that the suit might not have been brought at law for damages for breach of contract, if such a breach in fact took place.

Plaintiff contends the instrument is a nonnegotiable promissary note. We cannot agree with this contention. The instrument promises to pay "the full amount of the total value of the stock" and does not contain a promise to pay a sum certain. This being true the instrument is not a promissary note either negotiable or nonnegotiable. It is a mere contract to pay money, a mere chose in action. Smith v. Myers, 207 Ill. 126, 69 N.E. 858; The Fidelity & Deposit Company of Maryland v. Young, 159 Ill. App. 531.

The instrument on which suit was brought in this case does not promise to pay on demand or at a fixed time, nor does it agree to pay the amount absolutely and in all events. On its face it recites that Hansen makes the agreement because of verbal promises that Mason would never lose because of investments in the company. It would appear then that the obligation would be dependent on the prosperity of the particular company and may or may not be payable, depending upon that condition and the demand of the plaintiff.

Plaintiff contends that the instrument being under seal imports a consideration and even in equity the defendant must affirmatively show that there was a failure or lack of considera-

tion. This accurately states the law; however, the court is faced with an instrument under seal which by its terms sets out an agreement or understanding clearly unilateral in all aspects. Plaintiff demands money for stock and tendered the stock as consideration for such money by his claim and also in open court. The amount payable under the agreement cannot be ascertained from the instrument itself unless this court can ignore the words "the full amount of the total value of the stock". While it is true that the presence of a seal on a contract imports consideration, yet when the amount of the obligation cannot be ascertained from the instrument, then we are at a loss to see how the seal can be of significance. Plaintiff contends the agreement is to pay $6,250.00, yet if we believe this to be true we must logically believe that this is the price Mason paid for the stock and the stock is the consideration for the agreement. From there it must of necessity follow that the instrument is no more than an attempt at a contract for the purchase and sale of the particular stock, under the terms of which Hansen was bound to buy from Mason but Mason was not bound to sell to Hansen. So construing the instrument we are of the opinion that it lacks mutuality, is unilateral and unenforceable. In re Estate of Peterson, 286 Ill. App. 424, 3 N.E. 2d 725. In the case last cited the court cites with approval Martin v. Cox, 13 Ga. App. 236, wherein an instrument very similar to the instrument in the case at bar was held to be unilateral and therefore unenforceable.

Plaintiff finally contends that there was no proof of want of consideration and that in the absence of such proof the lower court erred in refusing to allow the claim. Counsel for appellant overlooks the very basis for the decision of the lower court. The instrument on its face fails to state the obligation due from Hansen to Mason and the lower court found that it is at best, an offer on the part of Hansen to purchase the aforesaid stock. Upon this theory, had the plaintiff accepted the offer within a reasonable time and had he done so prior to the death of Hansen his contention that there was no proof of want of consideration or the contention that the instrument being under seal imports consideration might have some merit. Upon the theory that the instrument is a mere offer to buy on the part of Hansen, Hansen's death revoked the offer to buy and the same cannot now be accepted. For the reasons set forth herein the judgment of the lower court will be affirmed.

Affirmed.

Carroll, P.J., and Reynolds, J., concur.

[illegible]

[illegible] of a [illegible]

lower court [illegible]

[illegible] by [illegible]

court. [illegible]

the [illegible]

[illegible], [illegible]

stock. [illegible]

within a [illegible]

[illegible] the [illegible]

[illegible] or [illegible]

[illegible] of [illegible]

[illegible] the [illegible]

Bangalo [illegible]

be accepted. [illegible]

the lower court will be [illegible].

[illegible]

Carroll, [illegible]

244

A

NO. 11023 (Publish abstract only) Agenda 1

17 I.A.2d 415

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, FIRST DIVISION

OCTOBER TERM, A. D. 1957

EUGENE ROSENGREN, Plaintiff-Appellant, vs. DONNA MAE ROSENGREN, Defendant-Appellee.	Appeal from the Circuit Court of Kane County

McNEAL, J.--

Eugene Rosengren filed a complaint for divorce in the circuit court of Kane County against his wife, Donna Mae Rosengren, charging her with adultery. The cause was tried by the court without a jury on plaintiff's amended complaint and defendant's answer denying adultery. The trial resulted in a decree finding the issues in favor of defendant and dismissing the matter for want of equity. Plaintiff contends that the decree is against the manifest weight of the evidence. Defendant's theory is that there was evidence tending to show that plaintiff himself was guilty of adultery which required dismissal of his action, and that defendant was not guilty as charged.

The parties were married on December 10, 1949, and are the parents of two children, a boy five and a half years of age and a girl aged four. They lived together in Aurora until January 3, 1956, when plaintiff left the defendant. In support of his charge that his wife committed adultery with Wilbur Schmidt, the evidence tends to show: that plaintiff introduced his wife to his friend, Schmidt, at a bar in Aurora in August, 1955; thereafter Schmidt was a visitor in plaintiff's home two or three times a week, and occasionally he was accompanied on these visits by Mrs. Schmidt; toward the end of November the Schmidts separated; in December Schmidt and

Mrs. Rosengren became infatuated, there were frequent telephone conversations between them, and they were together on numerous occasions at various taverns in Aurora and vicinity. Plaintiff testified that his daughter told him in his wife's presence that Schmidt "hugged and kissed Mama in the back seat of the car", and that his wife admitted that she was in love with Schmidt and he was in love with her. Schmidt testified that he was in love with Mrs. Rosengren and had told her so a thousand times. On Christmas night, New Year's Eve and day, and several other occasions Mrs. Rosengren was absent for long periods from her home, and when plaintiff inquired where she had been, she replied that it was none of his business. Defendant and Schmidt visited several taverns during the evening of January 13, 1956. About midnight plaintiff, accompanied by his friend, Joe Reid, and two Kane County deputies, found Mrs. Rosengren and Schmidt on the rear seat of his car parked with lights out behind a clump of trees and bushes on the grounds of the Montgomery Gun Club. Mrs. Rosengren had her shoes off; otherwise both were fully dressed. Schmidt explained that he was talking to Mrs. Rosengren about her husband and children, and they discussed their future together--he wanted to marry her. Both denied that any act of adultery was ever committed.

For the defendant, Schmidt testified that in August, 1955, he met plaintiff and Una Keslinger in a tavern. Shirley Goldman came in and the two couples decided to go swimming in a pond at the Gun Club. Schmidt and Mrs. Goldman went to the club in his auto, and plaintiff took Mrs. Keslinger there in his car. They arrived at the Gun Club around 9:00 or 10:00 P.M. Plaintiff and Mrs. Keslinger undressed in his car, and they went swimming naked. They were in and out of the water about half an hour. The moon was out bright enough to see across the pond. Schmidt and Mrs. Goldman decided not to swim, so he showed her around the grounds of the Gun Club. After walking around ten or twenty minutes, they returned to plaintiff's car, but plaintiff and Mrs. Keslinger could not be found, so Schmidt and his companion left the club.

Mrs. W[illegible] became in[illegible]

[illegible]

committed.

On the occasion [illegible] plaintiff and [illegible] the two couples [illegible] Schmidt and Mrs. [illegible] took Mrs. Keslinger [illegible] around 9:00 or 10:00 p.m. [illegible] the car and they went swimming [illegible] They were in and out of the water about half an hour. The moon was out bright enough to see across the pond. Schmidt and Mrs. [illegible] decided not to swim, so he showed her around the grounds of the Gun Club. After walking around ten or twenty minutes, they returned to plaintiff's car, but plaintiff and Mrs. Keslinger could not be found, so Schmidt and his companion left the club.

Mrs. Goldman corroborated Schmidt's version of the swimming episode. Plaintiff and the former Mrs. Keslinger denied that they were in the company of Schmidt and Mrs. Goldman, near the Gun Club, in August, 1955.

Plaintiff objected to interrogation of witnesses concerning his association with Mrs. Keslinger, on the ground that there is no charge of recrimination in the pleading. Defendant's attorney suggested that plaintiff's fitness to have custody of the children was an issue under the pleading. The court stated that plaintiff's objection would stand to all such questions; and that such testimony was admissible for the purpose of showing fitness or lack of fitness, and for that purpose only, and not by way of recrimination.

Section 10 of "An Act to revise the law in relation to divorce", approved March 10, 1874, as amended June 28, 1935 (Par. 11, Ch. 40, Ill. Rev. Stat. 1957), provides that: "If it shall appear, to the satisfaction of the court * * * that both parties have been guilty of adultery, when adultery is the ground of the complaint, then no divorce shall be decreed."

In Decker v. Decker, 193 Ill. 285, 289, the Court referred to section 10 and said, "This section makes it the imperative duty of the chancellor to refuse to dissolve the marriage relation in all cases where it shall satisfactorily appear that * * * adultery is charged and both parties were shown to have been guilty of adultery. * * * The pleadings of the parties or the issues they may see fit to make, are wholly inconsequential, so far as the exercise of this power of the chancellor is concerned.

"If, in a divorce proceeding where the complaining husband or wife seeks the dissolution of the marriage tie on the ground his or her consort has been guilty of adultery, it is disclosed to the chancellor that the complainant has been guilty of the same violation of the marriage obligation, the chancellor, as the representative of the public interest and the welfare and purity of society, must, in obedience to the command of said section 10 of the Divorce Act, refuse to grant a decree of divorce. In this respect section 10 is a declaration of a fixed

public policy that the benefit of the statutory provision authorizing decrees of divorce shall not be extended by the courts to those where both the husband and wife have committed the offense of adultery, but that those who had each so offended against the marriage relation should be dismissed from the court and left to themselves as strangers and wife."

In Ollman v. Ollman, 396 Ill. 176, 181, the court said: "It has long been the rule in chancery that an affirmative defense, to be availed of, must be set up by the defendant in his answer. . . . This is true as a general proposition, but an action for divorce involves interests other than those of the parties litigant. The State, as the sovereign, has an interest in maintaining the integrity and permanency of the marriage relation. . . . It is within the power of the chancellor of whom a decree of divorce is asked to stand as a representative of the public, and, in a proper case, to refuse to grant the decree, though the grounds of such refusal be without the issues made by the pleadings of the parties. (Decker v. Decker, 192 Ill. 285) In all divorce suits the public occupies the position of the third party. It does not plead, but is represented by the conscience of the court; and so, whenever a defense comes out in the evidence, whether alleged or not, it is fatal to the proceeding. (Johnson v. Johnson, 381 Ill. 362.)"

In Elston v. Elston, 344 Ill. App. 233, 240, this court said: "The fact that the affirmative defense of recrimination was not pleaded by the wife is of no moment or to be considered in a divorce suit where the court represents the State as well as impartially trying the issues joined by the pleadings. (Ollman v. Ollman, 396 Ill. 176)"

Under section 10 of the Divorce Act as construed by the Supreme

Court in the Decker case, it was the chancellor's duty to refuse to grant a divorce if he was satisfied that both parties were guilty of adultery, even though defendant's answer contained no allegation of plaintiff's adultery. When plaintiff objected to the interrogation of defendant's witnesses tending to show plaintiff's adultery, the chancellor's attention was called to the issues made by the parties under their pleading. As a consequence we think the chancellor overlooked his function as a representative of the public interest and improperly limited such evidence to the question of plaintiff's fitness to have custody of the children. The chancellor was required to consider any defense shown by the evidence, whether pleaded or not.

We are cognizant of the rule urged by appellant that it is not necessary to prove adultery by direct evidence, and that adultery may be proven by circumstantial evidence which raises a presumption of cohabitation and unlawful intimacy. Stiles v. Stiles, 167 Ill. 576, 604; Dunham v. Dunham, 162 Ill. 589, 624; Zimmerman v. Zimmerman, 242 Ill. 552, 559. However, this rule is equally applicable to the evidence pertaining to plaintiff's moonlight rendezvous with Mrs. Keslinger at the Gun Club swimming pool. The chancellor saw and heard the witnesses. He was in a better position to determine the credence to be given the testimony of the witnesses than we are on review. On the evidence shown by the record here it was for the chancellor to determine the weight and credibility of the evidence. In our opinion the chancellor may have found that both parties were guilty of adultery, and such a finding is not against the manifest weight of the evidence. If it appeared to his satisfaction that both parties were guilty of adultery, it was the chancellor's duty to refuse to grant the divorce.

The decree of the circuit court of Kane County was correct and is therefore affirmed.

Affirmed.

DOVE, P. J., and SPIVEY, J., concur.

Gen. No. 11119 Agenda 4

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - SECOND DIVISION

FEBRUARY TERM, A. D. 1958

FILED

17 I.A. 416

FRANK C. AMERPOHL, Plaintiff-Appellee, -vs- ILLINOIS CENTRAL RAILROAD COMPANY, A CORPORATION, Defendant-Appellant.	Appeal from the Circuit Court, Winnebago County.

CROW, P. J.

This suit was brought by the plaintiff, Frank C. Amerpohl, a Yardmaster at the Wallace Yards, Freeport, an employee of the defendant, Illinois Central Railroad Company, under the provisions of the Federal Employers' Liability Act to recover damages for injuries allegedly suffered from a fall at the yards, January 31, 1955, about 8 p.m. The jury returned a verdict for the plaintiff for $17,500 and judgment was entered thereon. The plaintiff charged in his complaint, so far as now material, that the defendant failed to use ordinary care to furnish the plaintiff with a reasonably safe place to work, permitted ice and compacted snow to accumulate in an area where it knew, or should have known, that its employees would be required to walk in the performance of their duties, failed adequate-

ly to light the premises where it knew, or should have known, that its employees would be required to walk in the performance of their duties, and was otherwise negligent and violated its established rules, customs and practices, and that the plaintiff in the course of his employment slipped on some accumulated ice on a grade or incline on the north side of the yard office between the office and the tracks, fell as a direct and proximate result of the defendant's negligence, sustained injuries to his back, and has been severely damaged. The defendant's answer denied all the allegations except that it was a corporate common carrier by railroad in interstate commerce, and as matters of affirmative defense alleged the plaintiff was a yardmaster, his duties included supervision of the maintenance of the yard, he was aware of, or should have been aware of the condition of the area, he assumed as a risk of his employment any defect existing, his injuries were proximately caused by his negligence, and the defendant was guilty of no negligence proximately contributing thereto. The plaintiff's reply admitted he was a yardmaster and denied the rest of the allegations thereof. The defendant's motion at the close of the plaintiff's evidence to strike the allegations of negligence was denied as to the foregoing allegations and allowed as to some others, and its similar motion at the close of all the evidence to strike the foregoing allegations of negligence was denied. Its motions for directed verdict at the close of the plaintiff's evidence and at the close of all the evidence were denied. Its post trial motion for new trial or judgment notwithstanding the verdict or a remittitur was also denied.

The defendant urges that the plaintiff was a vice-principal in charge of defendant's Yards at the time; no inherently dangerous condition existed; the injuries were caused solely by the plaintiff's negligence; and the judgment is excessive.

The statute upon which the plaintiff's cause of action was based is the Federal Employers' Liability Act: Title 45 USCA pars. 51 ff. The first material section of this law, par. 51, provides that:

> "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its * * * track, roadbed, works * * * or other equipment."

The evidence discloses that the plaintiff, Frank C. Amerpohl, was about 64 years old, had been employed by the Illinois Central Railroad for thirty-seven years, and had been a yardmaster of the Wallace Yards for about thirteen years. The Wallace Yards consists of eight tracks used for switching and classification of trains, plus two main lines, all the tracks extending east and west, and the eight switching tracks each accommodating various numbers of cars from 55 to 110. The yardmaster is in charge of all train movements or operations between East Junction, east of Wallace Yards, and West Junction, which lies to the west, and he has charge of the make-up and break-up of trains within the yard limits. The plaintiff said he had two employees working under him, a light clerk and a desk man. He said his

duties were to tell other employees where to take the cars and how to make up the trains. Wallace Yards is divided into what are termed the East Yard and West Yard. The yard office is nearer to the East Yard, and consists of a square building with doors on the south and east which are on ground level, and a door on the north which opens onto a two and one half foot square cement platform which has guard rails along the north and east sides. Two steps lead down to the west from that platform to a cement sidewalk which runs along the north side of the building from the steps to the west side of the office. Immediately north of the sidewalk and for substantially its whole length there is a grade, or incline, for a few feet down to a roadway extending east and west, and immediately north of the roadway are the railroad tracks extending east and west. The roadway comes from a nearby public highway and is located entirely within the yards. The plaintiff said that grade or incline constituted a drop of about 2 feet in a 7-8 foot distance from the sidewalk to the roadway. Certain other witnesses described the grade as being lesser and that distance as being smaller. So far as we can perceive from the photographs and a plat of a survey the plaintiff's estimates of those physical facts are more nearly correct. The grade and roadway were made of chat or tail minings, being a substance similar to sand except the kernels are bigger.

On January 31, 1955, the plaintiff reported for work at approximately 4:00 p.m., his normal starting time, and drove his automobile along the foregoing roadway on the north side of the yard office and parked to the west between the yard office and a section gang shed, located west of the yard office. He walked from his automobile and entered the south door of the yard office. It was daylight when he arrived. He didn't notice

any snow or ice in walking from his car to the office and didn't recall looking to see if there was snow or ice. The weather was cold and for a space of nine days from January 22, 1955 through January 31, 1955, the temperature never got over freezing, with the average maximum being 28.1 and average minimum being 13.1. During the month the total precipitation was 3.5 inches, with no snow falling on the 30th or 31st.

On the date concerned the plaintiff was seated in the yard office and was fully dressed to go outdoors. He had recently talked by phone with the operator at East Junction. He had been advised of the number of cars in an incoming train. East Junction was approximately two miles from the Wallace Yard and it normally took from twenty to forty minutes for a freight train to arrive at the Yard from East Junction. There was only one other train occupying any track in the Wallace yard at the time, this being track No. 2. The plaintiff told the operator at East Junction that this particular incoming train would go on track 3 or track 4, the exact track he had designated not being fixed in his mind at the time of trial. While in his office, and after talking with the operator, the plaintiff heard the train coming. He was busy, and he could not see the track from his office. His office was located in the southwest corner of the building with windows in the south and west walls only. He was in a hurry to get to the incoming train before it got by him. His mission, which he described as the practice followed at that Yards at the time, was to tell the trainmen to "double over", i.e., place some of the cars on one track and the excess

cars on another track, because all the cars in this particular train could not be accommodated on just one of the available tracks. The Yardmaster does not know the actual length of the train until it gets to the Yard. Whether he had a lantern with him as he left the office he could not recall, but he generally carried a lantern to light his way.

He proceeded out the north door of the building onto the landing and down the steps to the west onto the sidewalk. There was no snow or ice on the landing or steps or sidewalk. He then took four or five steps north off the sidewalk and was close to the foregoing roadway when he slipped and fell on his buttocks on the grade or incline on the south edge of that roadway. He stated that there was ice on the incline, and there was no sand, salt or cinders there. The route the plaintiff took to the north off the sidewalk just west of the door was frequently and commonly used by him as Yardmaster and other employees in going to and from the Yard office, the tracks, various assignments, and lunch. One of the defendant's witnesses described it as a sort of path ordinarily used by the Yardmaster and Brakemen in going from the north door down to the track. The patch of ice was about 5' in diameter. He got to his feet afterwards and walked north across the roadway, then across the first tracks beyond, and didn't notice whether there was snow or ice between the tracks. There was a train on track No. 2, so he crossed between the cars by crawling over the coupling device which was about three feet above the height of the rail. He came down off the ladder onto the ground and talked to the head brakeman on the incoming train on

another track and told him to "double over". That train was about even with the north door of the office hen he talked with the head brakeman. After five minutes at the most, he again crawled back over the coupling device, using the ladder and stirrup on the side of one of the cars located on the No. 2 track. The stirrup at the bottom of the ladder was about thirty inches from the ground. He then crossed back over track No. 1 and onto the roadway which he followed to a point west of the yard office and then got back onto the sidewalk by a different route than he had originally taken.

The outside lights were all on when he left to talk to the trainmen on this incoming train, and when he returned to the office, but he stated they did not light up the area outside the north door or on the incline concerned. They consisted of one 60 watt bulb above the north door of the office, which had no reflector, which was affixed to and under the projecting eave of the building, and which was pointed straight down; and a light with reflector set on a pole some 25-30 feet above the ground, about 6 feet west of and slightly south of the northwest corner of the yard office, and about 20 feet from the north door, which light was pointed in a downward, angling direction northwardly towards the tracks, and which the plaintiff said was for the purpose of enabling trainmen in getting on and off the caboose (or caboose track). He had not been out of that north door on the date in question prior to this mission, and he did not go out the north door the day before, January 30th, or the three days prior to that. During the last ten days of January he did not particularly notice any of the area surrounding the office. His normal

work day was 4:00 p.m. to midnight except Sunday when he worked from 8:00 a.m. to 4:00 p.m.

After the plaintiff returned to the office, he crawled up on a desk and told the Desk Clerk, Walter Tappe, and Conductor Kenneth Carey how he had hurt himself, and one of them remembered that conversation. He continued to work that evening and every day for a week or ten days. He was off work from March 3rd to May 2nd.

He said Track Supervisor LeRoy (of the Maintenance Department, head of the track or section foreman), had charge of the supervision of employees to clean sidewalks, etc. He also said he, the Yardmaster, supervised removal of snow about the Yard and office at times when the switches are filled with snow, and he had a right to call the Supervisor or Section Foreman, and had done so sometimes mostly to remedy conditions relating to switch operations.

E. E. Mellis, General Yardmaster between East and West Junctions in Wallace Yards, testified for the defendant, in part, that: As Yardmaster, he worked from 8:00 a.m. to 4:00 p.m. daily except Sundays. The Yardmaster's duties are to control trains and engines arriving and departing between East and West Junctions, the reswitching and reclassification of outbound trains. He is also the supervisor over the yard crews, yard clerks and lead car men with respect to passing information to them regarding the number of trains. He also has a supervisory function in regard to the area around the yard office to see that they are free from hazards and that the yards are taken care of to prevent any hazards from causing injury. If he observes a defect or condition

existing that he believes needs remedying, he calls the section foreman or car supervisor to have the conditions remedied. He has reported conditions to either the road supervisor or the section foreman and the removal of snow and ice is one of the things that is called to the attention of the section foreman. When leaving a shift, he turns over all the information concerning the trains and cars on hand and that are about to arrive so that the next shift would be able to continue. He has some supervision over the removal of ice and snow and has made requests of the section foreman. The foreman and his men would do the work. They have on occasion sanded, salted, or cindered the area around the yard office. He did not know whether the section crew had been notified to salt or sand any area around the yard office (on this particular occasion).

Earl L. Parker of Freeport also testified on behalf of the defendant, in part, that: He is trainmaster in the Freeport -Madison district and has been Trainmaster at Freeport for about one year. The Trainmaster's duties were to supervise train movements and operations in an assigned district and include supervision of all employees in his district. Mr. Parker himself was not the Trainmaster at Freeport when this incident occurred. The Yardmaster's duties in the Wallace Yards in Freeport on January 31, 1955 were the same as anywhere else in the Illinois Central System. Those duties were to supervise the movement of trains within yard limits, to supervise car men, section laborers, and anything to do with the make up or break up of trains. And between yard limits and within any given yard the yardmaster is in charge

of all employees within that yard's limits. Generally speaking, a yardmaster in his usual customary operation assumes control in supervising the area surrounding his yard office. In a general way, supervision consists of friendliness in working conditions for the men who work under him and seeing that any obstacles that would interfere with the movement of trains are taken care of.

Melvin Lens, of Freeport, testified, in part, for the defendant that: He is the Track Foreman at the Wallace Yards and has been employed in that capacity since 1929. His duties are to keep the tracks in repair for the passage of trains at any time. He is sometimes known as the section foreman, and track foreman and section foreman are interchangeable words. H. D. Lemoy, Track Supervisor, is his immediate superior. His duties are to supervise the track and the men under him. He has nine men working for him. The section foreman supervisor has charge of maintenance of the area around the yard. The Yardmaster does have a voice in the maintenance and upkeep of the area around the Yard office. He gives orders to fix and maintain thin s that come to his attention and the section foreman and crew take care of remedying those things that are called to his attention by the Yardmaster. He also on his own maintains the grounds without things being called to his attention. He was referring to the grounds outside the buildings. The Maintenance Department, which is the section foreman 's department, has charge of the removal of ice and snow from the sidewalks, steps and landings. He had no recollection of anybody calling attention to any defect in any of

the approaches or areas surrounding the Wallace Yards on or about January 31, 1955. His hours of employment are from 7:00 a.m. to 4:00 p.m. with one hour off for lunch. If a condition should arise during the hours of 4:00 p.m. to 7:00 a.m. the next morning, he would have to be notified by the Trainmaster, the Supervisor, or the Yardmaster. The section foreman really works for three different bosses, he said. He knew Frank Amerpohl. He did not know that Mr. Amerpohl fell on or about January 31, 1955 until about six weeks before the trial. He never had been asked by the Yardmaster to put any sand or salt or ashes on an incline on the north side of the yard office before January 31, 1955, and has not been asked since. He had never spread any ashes, etc. on the sort of path from the north door down to the roadway. It appears the section foreman's equipment, including salt, was in a separate shed, 40 feet or so from the Yard Office, and the plaintiff had no key or access thereto.

The defendant's rule book provided, in substance, as to the duties of Yardmasters that trains, or engines should be under control of the yardmaster at stations where a Yard force is employed and all employees in train or engine service should be subject to his direction, and the Yardmaster must make every effort to get high class trains through the Yard with the least possible delay. Those were not necessarily the only rules that governed Yardmasters, but they are the only rules pointed out in the rule book prescribing a Yardmaster's duties.

Under this statute, so far as material, the defendant is liable to any person suffering injury while employed by the de-

defendant, if the injury results in whole or in part from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency, due to its negligence, in its works or other equipment: 45 U.S.C.A. par. 51. The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: 45 U.S.C.A. par. 53. The employee shall not be held to have assumed the risks of his employment in any case where the injury resulted in whole or in part from the negligence of any of the defendant's officers, agents, or employees: 45 U. S. C. A. par. 54. The act abolishes the defenses, as such, embodied in the rules of contributory negligence, fellow servant, and assumption of the risk: DOWLER v. N.Y.C. and ST. L. R.R. CO. (1955) 5 Ill. (2) 125; CHICAGO, G. S. RY. CO. v. SCOVEL (1956) 232 F (2) 952; Cf. HALL v. CHICAGO and N. W. RY. CO. (1955) 5 Ill. (2) 135; MINNEAPOLIS etc. RY. CO. v. ROCK (1928) 279 U. S. 410, 73 L. Ed. 766.

Under the statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury; it does not matter that the jury may also with reason, on grounds of probability, have attributed the injury to other causes, including the employee's contributory negligence; the law was enacted because Congress was dissatisfied with the common law duty of the master to the servant, it supplants that duty with the far more drastic duty stated therein, it removes the usual common law defenses, and for practical purposes the inquiry now rarely presents

more than the question of whether negligence of the employer played any part, however small, in the injury; this statutory negligence action is significantly different from the ordinary common law negligence action; Congress vested the power of decision in the jury in all but the infrequent cases where fair minded jurors cannot honestly differ whether fault of the employer played any part in the injury: ROGERS v. MISSOURI PACIFIC R. R. CO. (1957) 352 U. S. 500, 1 L. ed. (2d) 493. To warrant the submission to the jury probative facts must be presented from which negligence and causal relation can reasonably be inferred: DOWLER v. N. Y. C. and ST. L. R.R. CO., supra. But neither we or the trial court are free to reweigh the evidence and set aside a jury verdict merely because we might have arrived at different conclusions: ALLENDORF v. ELGIN J. and E. RY. CO. (1956) 8 Ill. (2) 164.

The statute does not make the defendant an absolute insurer against injuries suffered by its employees; it imposes liability only for negligent injuries; but the issue of negligence is for a jury to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances; leaving the issue of negligence to the jury does not make the defendant an insurer; we cannot assume a jury will fall short of a fair performance of their constitutional function under the evidence and law; if the evidence might justify a finding either way the issue must be submitted to the jury; even though in a particular case there be evidence that the employee could have taken a slightly longer route, walked around the place where he was injured, and used a safer method of crossing, and even though that might have

been found to be contributory negligence, that would not immunize the defendant from liability if the injury is "in part" the result of its negligence, but would diminish the damages proportionately: WILKERSON v. MCCARTHY et al. (1949) 336 U. S. 53, 93 L. Ed. 497; Cf. CHICAGO G. W. RY. CO. v. SCOVEL, supra.

It is the duty of the defendant railroad company to exercise reasonable and ordinary care to furnish its employee with a reasonably safe place in which to work and to exercise reasonable and ordinary care to see that the place where he is required to work is maintained in a reasonably safe condition: CHICAGO G. W. RY. CO. v. SCOVEL, supra; ANDERSON v. ELGIN, J. and E. RY. CO. (1955) 227 F (2) 91. Where the evidence indicates that it is dark at the place the employee is working and the surrounding ground is high and uneven it may not be unreasonable to conclude that those conditions constituted an unsafe working place: LAVENDER v. KUHN et al. (1946) 327 U. S. 645, 90 L. Ed. 916. A railroad company, generally, is not liable to its employee for injuries resulting solely from climatic conditions, as such, such as ice and snow, but within its yard limits it must exercise a degree of care commensurate with the risks to prevent the accumulation of snow or ice in such quantity, form, and location as to be a menace to the safety of its employees working in its yards: ANDERSON v. ELGIN, J. and E. RY. CO., supra; FORT WORTH etc. RY. CO. v. SMITH (1953) 206 F (2) 667.

In ANDERSON v. ELGIN, J. and E. RY. CO., supra, the plaintiff switchman, employed in the defendant's Gary Yards, on a

January morning, about 7:30 a.m., stepped to the ground in the Yards from a stopped engine on which he had been riding, near a switch, which he was to throw, slipped on ice which covered the grounds, and fell, got up, threw the switch, later was hospitalized; continued to work some, and was later found to have an herniated intravertebral disc; the Court held there was no error in refusing to direct a verdict for the defendant or denying its motion for judgment notwithstanding the verdict. In FORT WORTH etc. RY. CO. v. SMITH, supra, the plaintiff's decedent, a switchman and engine foreman in the defendant's Wichita Falls Yards, on a January morning about 8:30 a.m. was last seen walking toward a switch shanty where employees assembled before going to work, in a track area, between certain tracks, which was gravelled, and which was covered, as was the whole Yards, with ice, sleet, or snow, and was very slick, and when found later he was lying near one of the tracks; he was hospitalized; months later he was found to have a back injury; more than 20 months after the incident he died from cirrhosis, carcinoma, and chronic myocarditis; the Court held there was sufficient evidence to go to the jury on the issue of whether the defendant was negligent in failing to use reasonable care in furnishing the decedent a safe place to work. In MCCRAY v. I. C. R.R. CO. (1957) 12 Ill. App. (2) 425, the plaintiff, a truck hand in the defendant's Burnside Yards, on a February day, about 4:30 p.m., left the shop in the Yards for home; the Yard was covered with ice, as was a roadway and sidewalk on the defendant's premises near the gate; there were some cinders spread on the ice on the roadway; he could see and was

looking down all the time; there were no cinders on the sidewalk, and he slipped and fell there, hurting his leg; the Court held there was no error in submitting the issue of negligence to the jury, and the jury did not act unreasonably in not determining that the sole proximate cause was the plaintiff's lack of care. In CHESAPEAKE and OHIO RY. CO. v. NEWMAN (1957) 243 F (2) 804, under the analogous Jones Act, 46 U.S.C.A., par. 688 ff., the plaintiff third mate on defendant's ship docked at Ludington, on a December day, about 6:30 p.m., it being dark, in the course of company business, walked along a path customarily used between the ship's dock and the defendant's marine shore office, where there was packed snow and ice, it being on the defendant's property, and slipped on an icy incline, fell, and hurt his knee, he saying the illumination was inadequate, and there was no salt,sand, or cinders spread there; the Court held there was clearly sufficient evidence to constitute jury questions as to whether the plaintiff was solely negligent, the defendant was negligent, or both were negligent, and the evidence supported the inferential findings of negligence in not furnishing adequate lighting, failing to take steps to render the ice and snow harmless, and generally failing to provide a reasonably safe pathway to and from the ship and marine shore office. In SCHULZ v. PA. R.R. CO. (1955) 350 U. S. 523, 100 L. Ed. 668, also under the analogous Jones Act, the plaintiff's decedent, a tug fireman, on December 25, about 7 p.m., went aboard the nearest of 4 tugboats docket side by side, of which he was in charge, to change his clothes and proceed to his job; 3 of the boats were unlighted; one was partly illuminated by spotlights from the

pier; there was some ice on the tugs; the decedent's job required he step from one boat to another; his partly clad body was found weeks later, drowned; the Court held fair minded men could certainly find the defendant negligent in requiring the employee to work on the dark, icy, and undermanned boats, and that he had slipped from an unlighted tug as he groped about performing his duties, and the case should have been submitted to the jury.

We are of the opinion that the record here contains sufficient evidence to establish a reasonable basis from which the jury could conclude that one or more of the officers, agents, or employees of the defendant were guilty of negligence, or that there was some defect or insufficiency, due to its negligence, in its works or other equipment, and that, in whole or in part, the plaintiff's injuries resulted therefrom. The proofs justify with reason the conclusion that employer negligence played a part in producing the injury. It does not matter that the jury might also, with reason, on grounds of probability, have attributed the injury to other causes, including the employee's possible contributory negligence. This is not one of the infrequent cases where fair minded jurors cannot honestly differ upon whether fault of the employer played any part in the injury. There are probative facts from which negligence and causal relation can reasonably be inferred. The issues of negligence and proximate cause were for the jury to determine according to their findings of whether the employer's conduct measured up to what a reasonable and prudent person would have done under the same circumstances, and of whether the injury resulted in whole or in part therefrom.

It was the duty of the defendant to exercise reasonable and ordinary care to furnish its employee with a reasonably safe place in which to work, and to exercise reasonable and ordinary care to see that the place where he was required to work was maintained in a reasonably safe condition. Though it was not liable to its employee for injuries resulting solely from climatic conditions, yet within its yard limits it was required to exercise a degree of care commensurate with the risks to prevent or guard against the accumulation of snow or ice in such quantity, form, and location as to be a menace to the safety of its employees working in the yards.

There was an incline, of a fair degree and of a fair extent, between the sidewalk and road along the tracks, over which route or path just west of the north door the plaintiff and others commonly and frequently travelled from and to the yard office and tracks in the necessary discharge of their duties. The plaintiff might have walked westerly a little further to the end of the sidewalk and then turned north to the road and tracks, but the incline would appear to be about of the same degree and extent there, and there is no evidence that that way was more customarily used than the path just outside of the door which he followed. Perhaps he might have walked even further westerly to where the road turns south some ways west of the yard office, and where the incline probably was less abrupt, but there is again no evidence that that way was more customarily used than the path he followed, and it would have been longer and taken more time. There was a patch of ice of fair dimensions on the incline in the path

the plaintiff followed. It was not a small inconsequential bit of ice, or a patch located at some random untravelled or infrequently travelled point in the yards, which might reasonably go unnoticed or unattended to by a reasonably prudent person, but it was large enough and in such a position as to the usual way of travel of employees that a jury could with reason believe it should reasonably have been observed by the defendant and had some reasonable attention and measures to guard against the hazard. This does not mean the defendant was required to keep its entire yard wherever an employee might walk or run free from all accumulations of ice or snow, or that it must blanket its premises with salt, cinders, sand, or some other substance during or following any inclement winter weather. The only lights in the area of any significance were the one 60 watt bulb without a reflector, under the eave, pointed downward, over the north door, and the light with a reflector set on a pole some 25-30 feet above the ground, some 20 feet west of the north door, and slightly south of the northwest corner of the yard office, pointed angularly towards the tracks. Considering that this incident occurred at night at a point frequently travelled by the plaintiff and other employees in and about their duties, on an inclins and not at a level place, a jury could with reason believe there was some defect or insufficiency, due to its negligence, in the terrain, grounds, or lighting, being parts of the defendant's works or other equipment. Whether the lighting was reasonably adequate under the circumstances is hardly a technical engineering question. Whether, under the circumstances, commensurate with the risks at this point in its yard, considering the location, terrain,

use of the way, time concerned, and the amount of ice, the defendant, its officers, agents, or employees, had made reasonable and proper inspections of the area for ice rendering the employees' working conditions unreasonably hazardous or had taken reasonable steps to avoid, prevent, or alleviate such hazards as could be avoided, prevented, or alleviated, were proper questions for submission to the jury, as well as whether, under the circumstances, in view of the location, terrain, use of the way, and time concerned, there was any defect or insufficiency, due to its negligence, in its grounds, terrain, or lights, at that point, they being a part of its works or other equipment at the place concerned.

Whether the plaintiff was guilty of contributory negligence or not in not previously observing the ice, in going too fast, in not carrying a lantern, in not going on his mission by some other path or route, or in some other respect, was for the jury to determine, but even if he was that does not bar recovery, - the damages in that event are to be diminished by the jury in proportion to the amount of contributory negligence. There is nothing to indicate the jury did not fairly perform its duty. He did not assume the risks of his employment if the injury resulted in whole or in part from the negligence of the defendant's officers, agents, or employees. If some other employee or employees who might at common law have been "fellow servants" were negligent, and the plaintiff's injuries resulted therefrom, that circumstance, which would have been a defense at common law, is not a defense under the statute.

Though each case is always somewhat different on its facts, the present case is in many respects notunlike LAVENDER v. KURN et al., supra, ANDERSON v. ELGIN J. and E. RY. CO., supra, FORT WORTH etc. RY. CO. v. SMITH, supra, MCCRAY v. I. C. R.R. CO., supra, CHESAPEAKE and OHIO RY. CO. v. NEWMAN, supra, and SCHULZ v. PA. R.R. CO., supra.

Of the Federal and Illinois cases cited by the defendant, WILKERSON v. MCCARTHY et al., supra, AMES v. I. C. R.R. CO. (1956) 352 U. S. 512, 1 L. Ed. (2) 503, and CHICAGO G. W. RY. CO. v. SCOVEL, supra, all held favorably to the plaintiff; HALL v. CHICAGO and N. W. RY. CO. (1954) 1 Ill. App. (2) 552 was reversed, (1955) 5 Ill. (2) 135 and holds favorably to the plaintiff; DECKERT v. CHICAGO and E. I. R. CO. (1955) 4 Ill. app. (2) 483 holds favorably to the plaintiff; LAYNE v. B and O R. CO. (1953) 351 Ill. App. 186, BRADY v. SOUTHERN RY. CO. (1943) 320 U. S. 476, 88 L. Ed. 239, KILLIAN v. PA. R. CO. (1948) 336 Ill. App. 152 (abst.) and DELAWARE etc. R. CO. v. KOSKE (1920) 279 U. S. 7, 73 L. Ed. 578, hold there was either a total absence of proof of negligence or insufficient proof thereof to warrant submission of the case to the jury, but the facts in none of them are like the facts in the present case; ANDERSON v. ELGIN J. and E. RY. CO., supra, holds favorably to the plaintiff on the matters material to this case; DOWLER v. N. Y. C. and ST. L. R. CO., supra, and MARGEVICH v. CHICAGO and N. W. RY. CO. (1953) 1 Ill. App. (2) 162, hold favorably to the plaintiff.

The defendant argues, in part, that the plaintiff Yardmaster was in charge of the yards and was the defendant's vice-

principal at the time; he was not the fellow servant of other employees working under him; where his negligence in not directing subordinate employees to cover ice in the Yard with salt or sand is the proximate cause of his injuries he cannot recover; an employee is not entitled to damages for injuries resulting from a dangerous condition which by omission to do his duty the employee himself creates; and his injuries were caused by or solely by his own negligence.

This is not an action at common law, but under the Federal Employer's Liability Act, and since the act has abolished the common law "fellow servant" defense, even if and where it might otherwise be applicable, it is entirely irrelevant to consider whether the plaintiff was or was not the fellow servant of some other yard employees or whether the "vice-principal" qualification or "superior servant" qualification of the common law fellow servant rule applies or not. That whole defense itself having been abolished, the qualification of that defense is necessarily also abolished.

However, if the plaintiff employee here had some material duty to the defendant employer in relation to preventing or guarding against the accumulation of ice in such quantity, form, and location as to be a menace to the safety of employees, including the plaintiff, working in the yards, and if the jury should find the plaintiff had materially breached that duty, and that that breach was the sole proximate cause of his injury, any negligence of the defendant, if found, not being a proximate cause at all, he could not then recover, - not because of contributory negligence, since under the statute that does not bar recovery, and not because of his status as a"fellow servant" or not, or "vice-principal" or

not, or "superior servant" or not, at common law, - but because, under those circumstances, the injury simply would not have resulted in whole or in part from the negligence of the defendant and necessarily would not come under the statute. But if the plaintiff employee's injury resulted in part from the defendant's negligence and in part from, or combined with, the employee's own neglect of some such duty to the employer, or his own contributory negligence, then the employee is not barred, and the injury is covered by the statute, though, under those circumstances, the damages then should be diminished by the jury proportionately to the amount of whatever the plaintiff's contributory negligence may be found to have been: CHESAPEAKE etc. RY. CO. v. NEWMAN, supra.

Under the defendant's rule book, the plaintiff night shift yardmaster's primary duty was to control trains, or engines, in the yards, to direct all employees in train or engine service in the yards, and to make every effort to get high class trains through the yards with the least possible delay. The plaintiff says he had charge of all train movements within the yards, - the make up and break up of trains; he had 2 employees under him, a light clerk and a desk man; he told other employees where to take cars and how to make up trains; Track Supervisor LeRoy, of the Maintenance Department, head of the track or section foreman, had charge of employees to clean sidewalks, etc., but he (the plaintiff night shift yardmaster) supervised snow removal about the yard and office at times when the switches were filled with snow, and could call and had called the Track Supervisor or Section Foreman occasionally to remedy conditions relating to switch operations. E. E. Nellis, the General Yardmaster, on the day shift, said he had a super-

visory function to see that the yard office area and yards are free from hazards, if he observes a condition which needs remedying he calls the Section Foreman, or others, and the removal of snow or ice is one thing called to the attention of the Section Foreman, who, with his men, would do the work. Earl L. Parker, the Trainmaster in the district, said his duties included supervision of all employees in the district. Melvin Lens, the section or track foreman, said H. D. LeRoy, track supervisor, was his immediate superior; he has 9 men working under him; he has charge of the maintenance of the area around the yard, including the removal of ice and snow; the yardmaster sometimes gives orders to maintain things around the yard office and the section foreman and crew remedy such things; the section foreman really has 3 bosses, he said, - apparently the track supervisor, the trainmaster, and the yardmaster. The section foreman's equipment, including snow or ice removal materials, were in a separate shed some distance from the yard office, and the plaintiff night shift yardmaster had no key or access thereto.

The General Yardmaster, E. E. Nellis, on duty during the daylight hours until 4:00 p. m., Melvin Lens, the track or section foreman, whose hours were the same, H. D. LeRoy, the track supervisor and immediate superior of the section foreman, the Trainmaster for that district who supervised all employees in the district, and the plaintiff Amerpohl, the night shift yardmaster, following Mr. Nellis in his duties after 4:00 p. m., each apparently had some duty or responsibility, direct or remote, great or small, supervisory or immediate, in endeavoring to keep the yard reasonably free of ice and snow wherever and to the extent reasonably necessary so that the employees would have a reason-

ably safe place to work. It seems to have been a divided, or shared, or joint duty or responsibility. All seem to agree, however, that it was really the track supervisor, and the section foreman under him, and the foreman's crew of 9 who actually were charged with the primary, direct, immediate duty of removing ice and snow and who actually did it in fact.

The plaintiff night shift yardmaster held a position of some authority. But, under the circumstances, it can hardly be said, as the defendant argues, that he was the one person whose duty it was to see that conditions needing remedying were taken care of, - or that he was the Illinois Central Railroad that night so far as ice or snow removal was concerned, - or that the sole and only negligence, if any there was, was attributable to him, - or that the only cause for his fall is attributable to no one else except him. He may have had some supervisory, less direct duty in relation to preventing or guarding against the accumulation of ice at this point, but several other employees also had similar duties, - some much more direct and immediate than his duty. The jury has inferentially found that, if he had some such material duty, he had not materially breached it, or that such breach was, notwithstanding, not the sole proximate cause of his injury, or that the negligence of the defendant nevertheless was a proximate cause thereof, - and, under the circumstances, we cannot say that the proofs do not justify with reason the jury's conclusion.

Moreover, there are the additional facts and circumstances as to the terrain, grounds, and lighting, with respect to which the plaintiff apparently had no duty or responsibility to the

defendant at all, and what significance the jury may have attached thereto we cannot tell, but they have inferentially found that there was some defect or insufficiency, due to its negligence, in its grounds, terrain, or lights, at that point, - parts of its works or other equipment, - and we cannot say that conclusion is not justified with reason.

We are unable to say that the verdict for $17,500.00 is excessive. The plaintiff was treated by a company physician for some time shortly after the incident, and had physiotherapy treatments at a hospital, but at first was not confined to a hospital. He seems not to have progressed well and early in March was unable to get out of bed. About March 7th, he consulted his own orthopedic specialist, who first examined him at his home, and was under that doctor's care until about May 11, 1955. That specialist also reexamined him shortly before the trial, in March, 1957. The plaintiff was placed, on his doctor's recommendation, in a hospital about March 8, 1955 and was there 10 days. He was at home several weeks thereafter. The doctor had X-rays taken of his back in 1955 and 1957. The doctor saw him about ten times after his release from the hospital. His injury was diagnosed as a herniated intervertebral disc, or herniated nucleus pulposus, at the level of the fourth and fifth lumbar interspace. He first was put in traction at the hospital, and later was fitted in the hospital with a complete flexion body cast for his back which he wore while there and for an additional three or four weeks after leaving the hospital. The cast was removed then and

a special brace or corset support was fitted to his back. He still wears the brace day and night, working and even sleeping in it. He has a continuous dull ache in his back, which is so much of a part of his life that he refers to it as "normal" pain. In addition he has occasional sharp, continuous pain which radiates from his back into his legs. The long continued persistence of pain, the doctor said, confirmed the diagnosis of a disc injury. He was out of work about two months. His loss of wages and medical and hospital expenses were about $1700.00. The medical evidence was further to the effect that there was a visible narrowing of the fourth and fifth lumbar interspace between the orthopedic's examinations in March, 1955, and just before the trial in 1957, and a difference in size of the plaintiff's calves and thighs which difference did not exist at the time of the incident. The company physician who first treated the plaintiff was not a witness and there seems to be no dispute, medically, over the nature of the plaintiff's injuries. His doctor thought the condition would be of a permanent nature, but he had not recommended surgery, and said the plaintiff is able to work normally without surgery.

The question of damages is ordinarily peculiarly one of fact for the jury to determine, especially where there is no specific showing of passion, prejudice, or misconduct: MORTON v. LOUISVILLE and N. R. CO. (1956) 8 Ill. App. (2) 474, - where a verdict for $50,000 for back and neck injuries under this statute to an engine foreman, 52 years old, was held not to be excessive. An award of damages will not be set aside on the grounds of excessiveness alone unless it is so large as to strike the Court as manifestly unjust, such as being the result of passion or prejudice or a disregard of the evidence or rules of law: CHESAPEAKE etc. RY. CO. v. NEWMAN, supra, - where a verdict for $60,000 for a knee injury under the

analogous Jones Act to a third mate of a ship considerably younger, though, than the present plaintiff, was held not to be excessive. The trial court here considered this question on the defendant's post trial motion and denied the same. We see no reason to disagree.

AVRAM v. HAMMOND et al. (1952) 348 Ill. App. 68, referred to by the defendant, is an abstract decision and it cannot be determined therefrom whether the suit was under the statute here involved or not, - it probably was not, - or what the plaintiff's injuries were. In HAYES v. N. Y. C. R. CO. (1946) 328 Ill. App. 631, also cited by the defendant, a verdict for $30,000 under this act for alleged back injuries was held excessive, but there was no medical evidence of any injury except the plaintiff's own complaints of pain, and the judgment was reversed for another reason anyway.

The judgment will be affirmed.

AFFIRMED.

SOLFISBURG, J. AND WRIGHT, J. CONCUR

Wright, J., Concur

Gen. No. 11144 Agenda 16

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - SECOND DIVISION

FEBRUARY TERM, A. D. 1958

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. DONALD M. LARSON, Plaintiff in Error.	17 I.A. 417 Writ of Error to the Circuit Court of Lake County.

CROW, P. J.

The plaintiff in error, Donald M. Larson, hereinafter called the defendant, was indicted for the crime of rape and statutory rape. He entered plea of guilty to the crime of statutory rape and after a hearing was placed on probation for a period of four years. In December of 1956, a Petition for Revocation of Probation was filed and an Amended Petition was thereafter filed by the Probation Officer. The Petition and Amended Petition charged that the defendant had violated laws of the State of Illinois in conjunction with certain check transactions, and that he did leave the State of Illinois to go to New Smyrna Beach, Fla., where he was on November 3, 1956, without the permission of the Court. Hearings were had on the Petition for Revocation of Probation and while the de-

fendant was awaiting disposition of the Petition for Revocation of Probation and free on bond, the defendant left the State of Illinois and failed to appear for a further hearing on the Petition. The Court thereupon entered an Order reciting that the defendant had left the State of Illinois and revoked the defendant's probation, and ordered his arrest. A hearing was held after the defendant's apprehension and the defendant was then sentenced to the Illinois State Penitentiary for a term of ten years. The defendant seeks by this Writ of Error to Review the Revocation of Probation Order and the judgment entered sentencing the defendant to the Illinois State Penitentiary.

The judgment order of the Circuit Court of Lake County revoking the probation of Donald M. Larson, entered February 7, 1957, is as follows:

> "This cause coming on to be heard on motion of Eugene Snarski, Probation Officer of this Court, and the Court being advised that the defendant has left the jurisdiction of the State of Illinois contrary to the terms of the Probation Order heretofore entered, and the Court being fully advised in the premises finds that there is just and probable cause for the revocation of the defendant's probation.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Probation Order heretofore entered in this said cause wherein the defendant was convicted of the charge of rape be and the same is hereby revoked and it is ordered that a capias and warrant issue for the arrest of the defendant and that said warrant be returnable forthwith."

It is defendant's theory that the evidence was insufficient to support the Order revoking his probation; that the sentence of 10 years on the plea of guilty was improper; that

Defendant was [illegible]

tion of probation [illegible]

State of Illinois [illegible]

in the [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

> [illegible]
>
> [illegible] that the [illegible] and warrant [illegible] and that said warrant be [illegible].

It is defendant's theory that the evidence was insufficient to support the Order revoking his probation; that the sentence of 10 years on the plea of guilty was improper; that

the trial court should have determined the extent of defendant's mental capacity prior to sentence; and that the trial court erred in compelling the defendant to submit to a lie detector test.

We believe these contentions of the defendant are without merit. CH. 38, Sec. 791, ILL. REV. STAT. 1955, provides as follows:

> "Should any probationer found guilty of a misdemeanor or a felony depart from this State without the prior leave of the Court that placed him on probation, such act shall, of itself, operate as a termination of his probation and the Court shall thereupon enter judgment terminating such probation and he may thereupon be proceeded against as a fugitive from justice. When re-arrested and brought before the Court, the Court entering such judgment shall have power to set the same aside and proceed in its own discretion with respect to such probation as though such judgment had never been entered."

The defendant at the hearing on the amended petition to revoke probation upon the ground that the defendant was absent from the State of Illinois without the consent of the Court, offered no testimony. He was represented by counsel of his own choosing. The State offered a witness, Kathleen Cunningham, and she testified that she and the defendant were married in Michigan during the period of defendant's absence. She then related that she and the defendant traveled around the country through the Dakotas, Nebraska, Colorado, Texas, Alabama, Florida and then she left him in Augusta, Georgia, to go to Illinois, and arranged to meet the defendant in Patterson, New Jersey, where her brother lived. During these travels, the de-

fendant constantly spoke of men in a dope ring in Chicago, who were looking for him and wanted to kill him. He kept a .25 automatic with him and at one point in Nebraska, he went to a house where he said there was a man who was in a dope ring and from whom he wanted money to get back to Chicago. During the travels, he constantly acted as if someone were chasing him. She testified that he would not let her open any windows in the house. He told her a bear would come in if she would. He always kept the doors locked, and when they went into a room he would put a chair against the door. There was no objection by the counsel for the defendant to this testimony. At the time Donald M. Larson was granted probation he testified that he was married to one Nancy Larson. It appears that there was then pending in the Circuit Court of Lake County, Case No. 64709, NANCY J. LARSON vs. DONALD M. LARSON, the same being a Complaint for Divorce, which Complaint had been filed on August 30, 1956, and which docket showed that the suit for divorce had never been granted and was still pending in that Court.

The Order of Revocation of Probation was based solely on the defendant's absence from the State of Illinois without the Court's permission. The Supreme Court of Illinois in the case of PEOPLE vs. RAGEN (1954) 2 Ill. 2d 124, 117 NE 2nd 390, holds that the Court may properly revoke probation where it is shown a probationer has left the State of Illinois without permission. Since the defendant makes no contention that he was given permission by the Circuit Court of Lake County to leave the State of Illinois, we determine that the Circuit Court of Lake County did not err in revoking his probation for this rea-

son. Since the probation order is not based upon any other finding of fact, we do not deem it necessary to comment upon any evidence relating to the charge that the defendant violated his probation by violating certain provisions of the Criminal Code with respect to the issuing of certain checks, or any other charge. While we question the jurisdiction of this Court on Writ of Error to review the sentence given defendant on his plea of guilty to the crime of statutory rape, we think the sentence is not excessive. The punishment for the crime of rape, under the Illinois Statute, is imprisonment for a term in the penitentiary "not less than one year and may extend to life": CH. 38, ILL. REV. STATS. 1955, Sec. 490. The Supreme Court of this State has upheld sentences of life imprisonment for statutory rape: PEOPLE vs. POOLE (1918) 284 Ill. 39; PEOPLE vs. RARDIN (1912) 255 Ill. 9.

The next contention of the defendant is that the Court erroneously sentenced the defendant to a term of imprisonment in the penitentiary while the defendant was suffering from a mental illness. The only testimony in the record concerning any illness of the defendant was produced at the probation hearing at which both the mother and father of the defendant were present. Merle O. Larson, the father of the defendant testified that the defendant told him that he had been to a psychiatrist and doctored for some time and that the psychiatrist told him, the defendant, not to take a lie detector test because of the medication he was having, that it would not be a true test. The Court then asked defendant Larson if he wanted to say anything in behalf of himself

before the sentence was pronounced. His answer was: "I haven't anything to say, sir. I am confused." The Court thereupon asked him this question: "How long have you been taking pills?" The defendant answered: "For quite some time, sir. It has been for years." The Court then made the following comment: "The only place for you to be confined is some place where you will have no further difficulty, and if they cannot treat you that will be their problem." The responsibility for raising the question of an accused's insanity rests upon counsel for the accused or some friend, relative, or other person in the accused's behalf: PEOPLE v. HAUPRIS (1947) 396 Ill. 208.

We find no merit in the contention that the Trial Court should have summoned the jury to determine the defendant's mental capacity.

The last contention of defendant is that he was required to take a lie detector test. The facts in this case show conclusively that the defendant did not take any lie detector test and that no test was given. It is true that the Court asked the defendant if he was willing to take a lie detector test and the defendant answered: "I have agreed to do it this morning." There is also evidence to the effect that the defendant had been to a psychiatrist who told him not to take a lie detector test because of some medication that had been given him.

We believe that the Order and judgment of the Trial Court was proper and correct under the facts presented.

The Order and sentence of the Trial Court is affirmed.

A F F I R M E D

SOLFISBURG, J. and WRIGHT, J. Concur

Wright, J. Concur.

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17 I.A. 2d 417

47282

ANNE GEFTMAN, Plaintiff - Appellant, v. WILLIAM H. GEFTMAN, Defendant - Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This appeal is from an order denying plaintiff's petition for a rule, upon her ex-husband, to show cause why he should not be held in contempt of court for refusal to comply with the terms of a "property settlement agreement."

The petition alleges the entry of a divorce decree "in this cause" on December 8, 1955 and the order in the decree making the "property settlement agreement" part of the decree with a retention of jurisdiction by the court to enforce the terms of the agreement. It also alleges that in paragraph 5 of the agreement defendant agreed to "give. . . to the wife the sum of $28,000 in cash to be paid as hereinafter provided"; that in paragraph 5 (b) of the agreement it is provided that, "The balance in cash in the sum of $23,000.00 shall be due and payable at the rate of $100.00 per week, or more at the option of the Husband, each and every week until the total balance due is paid in full. . . ."; and that in paragraph 6 of the agreement it is provided that, in order to secure the payments by the husband, he shall deposit in escrow all the shares of stock in a corporation owned by him to be held until all payments are made, and that in case of default for a period of four weeks

the escrowee, on written demand, would "take any and all action necessary" to secure the money "from said stock" by sale, etc., and remove the default by paying the arrears to the wife, and that if any default be not remedied in seven days from notice to the escrowee the wife "may" take any action deemed advisable.

The petition alleges an arrearage of $1100.00;due demand after four weeks default; and failure of the escrowee to act. It alleges also that the defendant's default was wilful and that she needed counsel and was liable for fees. She prays for issuance of the rule and for an order on the escrowee to cure the default by sale, etc., of the stock.

Defendant answered stating he had complied with the agreement until August 1, 1956, when plaintiff remarried and that he "then refused to make any further payments." The affirmative averments are that the petition did not comply with the methods of enforcement set up in paragraph 12 of the agreement; that plaintiff is precluded under Illinois law from further payments because she remarried; that attorney's fees provided for in the agreement have been paid; and that the decree of divorce shows that "all terms and conditions" in the agreement have been "complied with and satisfied of record."

Plaintiff contends the denial of her petition was error because the agreement provided for a lump sum settlement and that under Walters v. Walters, 409 Ill. 298, her right to payments under the agreement was unaffected by her remarriage. Defendant, to sustain the order,argues only that the record on

appeal does not support plaintiff's contention because there is no report of proceedings and that the agreement relied on was not introduced in evidence and is not certified as part of the record on appeal. He says that for these reasons we should presume there was enough before the chancellor to justify the denial of the prayers of the petition.

We think that the record before us is sufficient to show that the order denying the prayer of plaintiff's petition was error. The order recites that the cause came on to be heard on the petition and answer and the affidavit of the escrowee "and the court having read the pleadings and having heard the argument of counsel and being fully advised. . . ."

The decree of divorce and the transcript of the evidence at the divorce hearing are properly before us. These have not been certified by the chancellor but are certified as true records of the Superior Court. It was not necessary that these records be introduced into evidence since the chancellor would take judicial notice of the "various steps" which had been taken in the case. Bailey v. Kerr, 180 Ill. 412, 417; Lurie v. Dombroski, 13 Ill. App.2d 152, 162. The "property settlement agreement" was by "reference thereto" made part of the decree for divorce in plaintiff's favor and it was therefore also part of the court record. It is not before us in toto, however, since the clerk did not certify it as part of his records.

The decision involved a question of law, the construction of the pertinent parts of the agreement, and we need not presume the chancellor heard evidence. We do presume that he was

"advised" by the Superior Court records. The allegations of the petition, set out enough to show that the "property settlement agreement" was for a lump sum. These allegations are admitted in the answer and defendant sets forth his performance of the other terms of the agreement. Furthermore, the evidence adduced on direct and cross-examination at the divorce hearing specified the terms of the "property settlement agreement."

All of this was before the chancellor and is in the record before us. We think the chancellor erred in denying the petition with these records before him. The record of the Superior Court and the record before us leaves no room for an inference that the "property settlement agreement" was not a lump sum settlement. The plaintiff's remarriage did not affect her right to the payments under that agreement. Walters v. Walters, 341 Ill. App. 561, 577.

The order is reversed and the cause is remanded with directions to issue the rule against defendant and for further proceedings.

REVERSED AND REMANDED
WITH DIRECTIONS.

LEWE AND MURPHY, JJ., CONCUR.

ABSTRACT ONLY.

7

A

17 I.A. 2d 418

47270

HOWARD T. FISHER & ASSOCIATES, INC., an Illinois corporation, Plaintiff - Appellant, v. LINCOLN VILLAGE SHOPPING CENTER, INC., an Illinois corporation, and ERNEST G. SHINNER, et al., Defendants - Appellees.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a suit to foreclose a mechanic's lien under Ill. Rev. Stat., Chap. 82, par. 1, for architectural services. Plaintiff, without notice to defendants, obtained an ex parte decree directing foreclosure of the lien.

Subsequently, defendants filed a complaint to vacate the decree. The court allowed the prayer. On appeal, this court reversed the order vacating the decree and remanded the cause with directions. (5 Ill. App.2d 372) Pending its appeal from the order vacating the decree, plaintiff, hereafter called Fisher, filed new pleadings in the foreclosure suit, consented to a referral to a master of a motion and "all other issues", and participated in hearings. In conformity with the findings and recommendations of the master in two reports, a decree was entered dismissing the foreclosure suit for want of equity. This is the second appeal in this case.

As it would unduly extend this opinion to relate the facts as to all points urged by plaintiff, the court feels that the following recital is sufficient for its purposes here.

In October 1949, Fisher entered into an agreement with the Lincoln Village Shopping Center, Inc., hereafter called Lincoln, for architectural services relative to the latter's shopping center. Before it was discharged, Fisher was paid the sum of $9,625.00.

December 28, 1951, Fisher filed its complaint to foreclose the alleged lien. April 17, 1953, defendants, Lincoln and Shinner, answered, claiming that the contract violated the Illinois Architectural Act (Ill. Rev. Stat., Chap. 10 1/2); that Fisher had been discharged for cause; and that it was overpaid. On May 20, 1953, the original ex parte decree was entered in Fisher's favor.

September 17, 1953, Lincoln and Shinner filed their complaint to vacate the decree, alleging that it had been obtained by fraud and without notice to defendants. Fisher's motion to strike Lincoln's complaint was denied, and on January 20, 1954, the court entered an order vacating the ex parte decree. The court in the instant suit after ordering a stay of execution, of the decree of foreclosure, allowed Lincoln to file the order vacating that decree with the court. On March 16, 1955, this court (5 Ill. App. 2d 372) reversed the order vacating the ex parte decree, and remanded the cause with directions " * * * to allow the Fisher Company to file pleadings joining issues on the complaint and to allow a hearing on the issues." The mandate of this court in that appeal was not filed in the foreclosure suit, nor was it filed in

the suit to vacate the decree until April 3, 1956, which was after the master had filed his original report and his report on the objections thereto in the foreclosure suit.

Pending the first appeal, on February 23, 1954, plaintiff, Fisher, filed an amendment and supplement to its complaint to foreclose the lien, and an amendment to its reply. Also, on that same date, there was an order referring the matter of the bill to foreclose to a master to take testimony and report the same together with his conclusions. March 2, 1954, Lincoln made a motion to strike Fisher's amended and supplemented complaint. The motion was set for hearing on March 11, 1954, " * * * without prejudice to the order of reference." Subsequently, on April 12, 1955, Fisher added a supplemental complaint for the purpose of foreclosing the redemptive rights of certain alleged lis pendens transferees. May 16, 1955, defendants filed their answer to the amended and supplemented and supplemental complaints, praying that the foreclosure suit be dismissed on the merits.

On September 21, 1955, the court signed another order of reference, referring defendant's motion to dismiss " * * * and all other issues raised by the pleadings as amended and supplemented herein." This consent order of reference was "O.K.'d" by Thomas H. Fisher, attorney for plaintiff. Pursuant to this second reference, the master conducted hearings on November 23, 1955.

At these hearings, Fisher sought first to have the constitutionality of the Illinois Architectural Act determined with the motions then being heard. The master in ruling on plaintiff's motion, decided that a decision regarding the

validity of the particular statute would not be made until it was necessary to do so in a determination of the suit. Fisher then asked that Lincoln be directed to prove the affirmative defenses alleged in its answer before Fisher was required to make out a prima facie case. The master denied this motion also, and directed plaintiff to proceed with its own proof before defendant was required to establish its defense to the suit. After a postponement to permit plaintiff to collect its proof, the latter still refused to proceed to make out a case, Fisher's attorney stating at a hearing on December 8, 1955 that they " * * * had decided to abide by their prior position taken here." At this time, Lincoln made a motion that plaintiff's action be dismissed for want of equity by reason of its failure and refusal to put in its proof. January 10, 1956, the master issued his report, finding that the burden was on plaintiff to prove a prima facie case before defendants' were required to prove their affirmative defense and recommended that the court enter a decree dismissing the cause for want of equity.

In an order of re-reference on October 1, 1956, the Chancellor directed the Master to report on the sole question of whether Fisher " * * * by its acts, conduct, proceedings or elections in this cause" had waived the ex parte decree of May 20, 1953. February 25, 1957, the Master filed his report, finding that "Fisher did authorize its attorneys to prosecute this action, and to the extent material here is bound by the acts of its attorneys in their conduct of the litigation." The master's report further found that Fisher by filing an amendment

and supplement to its original pleadings, consenting to an order of reference and participating in the hearings was acting inconsistently with its purported intent to rely on the ex parte decree of foreclosure. The Chancellor approved the original and supplemental reports and entered a decree accordingly.

Fisher insists that the ex parte decree of May 20, 1953 is still valid. We hold, however, that Fisher revested the court with jurisdiction to try the case on its merits when it filed additional pleadings, voluntarily appeared before the master and participated in the hearings. While our mandate in the appeal from the order vacating the ex parte decree left the decree in effect, Fisher's further participation was tantamount to abandonment by Fisher of its rights under our directions to allow it to plead, and it thus waived the original ex parte decree.

In Craven v. Craven, 407 Ill. 252, the court said at p. 255, " * * * the parties may, by appearing voluntarily and participating in further proceedings, revest the court with jurisdiction over their persons and the subject matter of the action. (Rossiter v. Soper, 384 Ill. 47; Weisguth v. Supreme Tribe of Ben Hur, 272 Ill. 541; Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61; Herrington v. McCollum, 73 Ill. 476.) To avail themselves of the right to question the jurisdiction of the court, defendants should either have not appeared at all or limited their appearance to an objection against the jurisdiction of the court." Fisher did not rely on the decree of foreclosure. Instead, it approved the order of reference of

September 21, 1955, referring " * * * all other issues raised by the pleadings." In Ridgeley v. Central Pipeline Co., 409 Ill. 46, the court said that the elements essential to revesting the court with jurisdiction are:

> " * * * (1) the active participation by the parties without objection (2) in further proceedings inconsistent with the prior order of dismissal. As all further proceedings upon the merits of a previously dismissed action are inconsistent with a prior order dismissing the action, it follows that any further proceeding upon the merits of a cause operates to nullify the order of dismissal." (p. 50)

(To the same effect see Groves v. Ill. Pub. and Printing Co., 327 Ill. App. 544; Friese v. Mid-City Bank, 298 Ill. App. 17; Zandstrah v. Zandstrah, 226 Ill. 293; Ringholm v. Fitzgerald, 208 Ill. 268; and the recent case of Miller v. Miller, 5 Ill. App.2d 238.) The rule announced in the cases last cited has been fully sustained in other jurisdictions. (124 ALR 155)

Furthermore, plaintiff filed a supplemental complaint, adding four additional parties, and prayed that the additional defendants be joined " * * * as supplemental defendants for all purposes." (Emphasis ours). In addition, Fisher in its reply filed May 22, 1955, categorically denied the affirmative allegations of the answer and prayed " * * * judgment as in its Complaint, as amended and supplemented, and Supplemental Complaint heretofore filed." (Emphasis ours) It is a rule of chancery practice that by filing an amended or supplemental bill, all previous decretal orders are vacated, and the defendants may answer the original and amended or supplemental bill. Such an amended or supplemental bill is held to make a new case. (Odell v. Levy, 307 Ill. 277. To the same effect see Thomas v. McGinnis, 94 Ill. App. 248.)

Plaintiff argues that the attorneys may not waive the valuable property rights unless expressly authorized by their clients to do so. This contention is untenable. In Union v. Central Insurance Co., 291 Ill. App. 423, the court said at p. 436 that,

> "Courts have the right to determine whether the language or conduct of a party, or his counsel, amounts to a waiver or estoppel, as a matter of law. This principle applies with full force in the proceedings of a cause, from its commencement to its final determination.
>
> "Representation in courts is a necessity of civilized society, and the acts of the representative must in some degree be binding upon the party represented. When one puts his case in the hands of an attorney, it is a reasonable presumption that the authority conferred includes such actions as the attorney in his superior knowledge of the law, may decide to be legal, proper, or necessary in the prosecution of the suit, and consequently whatever adverse proceedings may be taken by the attorney are to be considered binding upon the client. Attorneys may waive objections, pleas, make admissions of fact, and of necessity make disposition of many things that arise in and about the trial of cases."

Plaintiff asked for and obtained an adjournment to get its proof together, but failed to offer evidence to prove its case. We can only conclude, as did the master, that Fisher was unable to prove its claim against defendants, and was "* * * to the extent material here . . . bound by the acts of its attorneys. . . "

Fisher further complains of the master's fees. The Statute, Ill. Rev. Stat., Chap. 53, par. 38, provides that, " * * * masters in chancery may receive for examining questions in issue referred to them, and reporting conclusions thereon. . .

such compensation as the court may deem just. . . ." The master made a detailed account of his charges. Such charges rest largely in the discretion of the trial court. In Horan v. Blowitz, 13 Ill.2d 126, the court in adverting to Handleman v. Arquilla, 407 Ill. 552, said at pp. 133-134, "The sum to be paid should be based on the time necessarily devoted to the work, the intricacy of the proof and the complications of fact and law, involved in preparing the report of his findings and conclusions." From an examination of the record, we find that there were two reports prepared by the master and that he ruled on lengthy and numerous briefs. We are of the opinion that the master's charges are amply justified.

For the reasons stated, the decree is affirmed.

AFFIRMED.

KILEY, P.J. AND MURPHY, J., CONCUR.

ABSTRACT ONLY.

General No. 11137 Agenda No. 5

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT-FIRST DIVISION

February Term, A.D. 1958

17 I.A.2d 492

LUCILE R. KOVAC, Plaintiff-Appellee, vs. JOSEPH A. KOVAC, Defendant-Appellant.	Appeal from Circuit Court McHenry County

DOVE, P.J.

Lucile R. Kovac, on February 15, 1957, filed in the Circuit Court of McHenry County her verified two count complaint against her husband, Joseph A. Kovac. In the first count she sought a decree for divorce, the custody of her two minor children, for a portion of her husband's property and for attorney fees and expenses. The second count realleged substantially all of the allegations of the first count and averred that the parties had been living separate and apart since January 28, 1956 and prayed for separate maintenance for herself and children, for the custody of the children and for attorney fees.

In her complaint, she alleged, among other things, that the parties were married on August 2, 1933; that plaintiff had always conducted herself as a true, faithful and affectionate wife; that the defendant committed various acts of cruelty toward her and the children on May 1, May 4, and May 19, 1956 and deserted them on

January 28, 1956. The complaint further alleged that the parties cohabited and lived together as husband and wife, in their home at Crystal Lake, Illinois until September 1, 1954 on which date defendant deserted the plaintiff and took up his residence in Chicago, Illinois; that defendant abandoned plaintiff in their marital home at Crystal Lake where plaintiff resides and that since September 1, 1954 defendant has only visited plaintiff at rare intervals.

The defendant was personally served with summons and filed his verified answer in which he admitted the marriage and birth of the children, denied the charges of cruelty and desertion and averred that the parties separated by mutual agreement in 1955. To this answer the plaintiff filed a reply. Thereafter and on June 7, 1957, the defendant filed a petition praying for an order determining the custody, education and control of the two daughters of the marriage, Elyse, age 16, and Judith, age 13 and on June 21, 1957 the plaintiff filed her verified petition praying for temporary alimony, support money, attorney fees and for other relief.

In this petition plaintiff alleged among other things, that she had been living separate and apart from the defendant without fault on her part since September 1, 1954; that the two minor children of the parties, were in the custody of the plaintiff in the residence of the parties located at Crystal Lake, in McHenry County, Illinois; that defendant was a certified public accountant, maintaining an office in Chicago, Illinois, and was interested in a variety of other business enterprises and that she was informed and believes that defendant's income

January , 1956. [illegible]

[illegible]

[illegible]

that she had [illegible]

without [illegible]

the minor [illegible]

plaintiff [illegible]

Lake, in McHenry County, Illinois; that defendant was a certified public accountant, maintaining an office in [illegible], Illinois, and was interested in a variety of other business enterprises and that she was informed and believes that defendant's income

from his profession, business interests and investments approximate the sum of $50,000.00 per year and that he was the owner of a substantial amount of real and personal property. She also alleged that she was possessed of no property, either real or personal, except an interest as legatee and devisee in the estate of her father, and that his estate was in the process of administration and that the only income which she received from it was rental from a five-room house, which was sufficient only to provide maintenance and upkeep of said house; that defendant had refused to contribute to the support of the plaintiff and her two minor children and that such refusal was wilful. This petition further alleged that plaintiff in 1956 filed her complaint for divorce in the Superior Court of Cook County, at Chicago; that defendant filed his appearance in that cause and objected to the jurisdiction of the Superior Court of Cook County on the ground that his residence was in McHenry County and said proceeding was thereafter dismissed.

On June 25, 1957 a hearing was had upon both petitions resulting in an order denying any relief to the defendant upon his petition with reference to the custody of the children. This order then directed defendant to pay to the plaintiff, as temporary support of plaintiff and the two children of the parties, the sum of $200.00 per week until the further order of the court.

The defendant did not make any of the weekly payments required of him by this order, and on August 2, 1957, plaintiff filed her verified petition praying that the defendant be ruled to show cause why he should not be held in contempt of court for failure to comply with the provisions of the order entered

on June 25, 1957. On the same day, August 2, 1957, the defendant filed his verified petition by which he sought a modification of the order of June 25, 1957 and on August 22, 1957 filed his verified answer to plaintiff's petition for a rule to show cause. By his answer he admitted that he and his wife were living separate and apart, alleged that he had previously filed his petition to modify the order of June 25, 1957, denied that he had refused to pay the $200.00 per week to plaintiff and averred that plaintiff had indirectly received from him the sum of $5000.00 as and for household expenses, clothing for the two minor children of the parties, school tuition, board and lodging and other incidental expenses pertaining to the support and maintenance of plaintiff and the two children.

The issues thus made by the petition of plaintiff for a rule to show cause and the answer thereto and the petition of defendant to modify the order of June 25, 1957 were heard on September 6, 1957, at which time the parties were again present in court and represented by counsel. Evidence was heard and an order entered denying the prayer of defendant's petition to modify the support order and found the defendant guilty of wilful contempt of court and sentenced him to the county jail of McHenry County for sixty days as punishment for said contempt. To reverse the portion of this order which found defendant guilty of contempt and sentencing him to jail for sixty days, defendant appeals.

Appellant contends that the order of June 25, 1957 is void because the court was without jurisdiction of the subject matter of this proceeding at the time this order was entered.

In support of this contention counsel argue that there is no allegation in the complaint that the plaintiff had been a resident of the State of Illinois for more than one year prior to the filing of her suit, and that such an allegation is absolutely necessary in order for the court to have jurisdiction of the subject matter of plaintiff's suit for divorce or separate maintenance. The first paragraph of both counts of the complaint is as follows: "That the defendant abandoned the plaintiff in their marital home at Crystal Lake in McHenry County, where plaintiff resides" and in the fourth paragraph, it is alleged: "That the parties cohabited and lived together as husband and wife in their marital home at Crystal Lake, Illinois, until to-wit: September 1, 1954, on which date defendant deserted plaintiff and took up residence in Chicago, Illinois; that since the aforesaid date defendant has visited the plaintiff at rare intervals from time to time but that the parties have been living separate and apart for all practical purposes since the aforesaid date and have not cohabited as husband and wife." The defendant concedes that the Circuit Court of McHenry County has jurisdiction generally in matters of divorce and separate maintenance, but defendant insists that in the absence of an allegation that plaintiff had been a resident of the State of Illinois for at least one year prior to the filing of her complaint for divorce or separate maintenance the Circuit Court of McHenry County did not have jurisdiction of the subject matter of this proceeding. There is no merit in this contention.

In Grossman v. Grossman, 315 Ill. App. 345, the court (p. 355) cited and quoted from O'Brien v. People ex rel. Kellogg Switchboard & Supply Co., 216 Ill. 354, where the Supreme Court, omitting the cited authorities, said: (pp. 363, 364) "Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit. If the law confers the power to render a judgment or decree, then the court has jurisdiction. Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs. Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance, for if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches and the court has power to decide, whether the pleading is good or bad. Jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be."

In the Grossman case, the court then cited Foreman Brothers Banking Co. v. Kelly-Atkinson Construction Co., 218 Ill. App. 356, and quoted therefrom where it is said: (p. 358) "In urging that the judgment be reversed, the defendant first contends that the judgment was void because the declaration showed no cause of action and no jurisdiction of the court to enter it. In our opinion the judgment was not void. We need not pass upon the question of whether the declaration showed a cause of action for, assuming it did not,

it would not follow that the judgment is void. It would be erroneous at most. Likewise, the sufficiency of the declaration has nothing to do with the court's jurisdiction. A court may have full jurisdiction of an action - the parties and the subject matter - though the declaration may wholly fail to state a cause of action. It is not denied that the court had jurisdiction of the parties to this suit. The jurisdiction of a court over the subject of a given case is the power of the court to hear and determine cases of the general class to which the case in question belongs."

It is true that before the Circuit Court of McHenry County could grant a divorce to appellee, it would be necessary for her to prove that she had been a resident of the State of Illinois for the length of time required by the statute and, at the time of filing her suit either she or the defendant was a resident of McHenry County. If the court, upon the hearing, found that the statutory requirements were not present, the court could not grant her a divorce or separate maintenance, but it does not follow that the court, in this proceeding, did not have jurisdiction of the subject matter.

The issue involved in this appeal is not one of residence. The record here requires this court to determine whether the trial court was justified in finding defendant guilty of contempt of court on account of his failure to comply with the order entered on June 25, 1957, which directed him to pay $200.00 a week to the plaintiff for the support of herself and the two minor children of the marriage. The issues made by the allegations of the complaint, answer and reply are still pending in the circuit court. This is an appeal only from that part of the order of the trial court

which found defendant guilty of contempt and sentencing defendant to the county jail for refusing to obey an order previously entered by that court. The question of whether there was sufficient evidence to warrant the entry of the support order of June 25, 1957, is not before us. The only question relative to the support order of June 25 to be considered now is whether the court had jurisdiction to make that order and not whether it was made on sufficient proof. We hold that the trial court did have jurisdiction of the subject matter and no question is raised as to jurisdiction of the parties.

At the hearing on the rule to show cause on September 6, 1957, the defendant admitted that he had not made any payments directly to his wife, as required by the court in its order of June 25. At the conclusion of that hearing the court stated that he thought the order of June 25 should be enforced and that the defendant should decide whether he was going to comply. A recess in order that counsel might confer was had and after the recess, counsel for plaintiff stated that nothing had come out of their talk. The court then stated that he did not like to send people to jail, even for the violation of a court order and would not do so if he had any assurance from the defendant that he would purge himself within a reasonable time, and he asked the defendant's counsel if he had anything to offer to the court. Whereupon defendant's counsel answered, "No." The court then stated: "It is the judgment of the court that the defendant be sentenced to the county jail of McHenry County for sixty days as punishment for his wilful and contumacious contempt of this court." The

formal written contempt order, followed this judgment and in our opinion it meets the requirement that an order finding a person in contempt of court be certain and definite. There can be no mistake as to how long the defendant is to remain in jail, as the time is fixed at sixty days. (Kanter v. Clerk of the Circuit Court, 108 Ill. App. 287, 305)

Without conceding that the support order of June 25, 1957, was valid, counsel for appellant argue that the evidence was insufficient to justify the trial court in finding defendant guilty of contempt inasmuch as the evidence discloses that defendant permitted his children to purchase clothing and other necessaries which he paid for and that in addition he paid tuition to a boarding school which the girls planned to attend. There was introduced into evidence at the hearing by stipulation an exhibit which showed that defendant had paid $516.29 between July 17, 1957, and July 30, 1957, for utilities, yard work, automobile repairs, clothing for one of the daughters and other items of expense in connection with the Crystal Lake home and during the month of August, 1957, defendant had paid $1,170.86 for clothing for his two daughters and $1,600.00 for their school tuition and board. These amounts aggregate $3,287.15.

The order of June 25, 1957, directed defendant to pay to the plaintiff $200.00 a week for the support of his wife and their two children. The defendant admits that he has not made these weekly payments. The fact that he was generous in paying tuition and board for his children at Fairfax Hall and in purchasing clothing for them and did pay for some of the utilities and upkeep for the home occupied by his wife and children after the support order was entered,

does not excuse his wilful failure to comply with that support order. It is not insisted that appellant is unable to pay the amount directed and no excuse is suggested, other than the foregoing, why he does not do so.

In Anderson v. Anderson, 124 Ill. App.613, it is said: (p. 621) "If the order of commitment was intended as punishment, it should have fixed a definite time of imprisonment, and if it was intended as a means to compel payment of the alimony awarded, it should have provided for appellant's release on payment of the alimony."

In Kahlbon v. The People, 101 Ill. App. 567, the court (p. 68) quoted from Rapalje on Contempts, Sec. 129, where it is said: "---the better opinion seems to be that the order of commitment should name a definite term of imprisonment in all cases when the imprisonment is inflicted as a punishment for the contempt, and not as a means to compel the party to do some act required of him by the court."

There is no reversible error in this record and the judgment appealed from is affirmed.

Judgment affirmed.

McNeal, J., concurs

Spivey, J., concurs

No. 11121 Publish Abstract Only Agenda 5

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

FEBRUARY TERM A. D. 1958

17 I.A. 493

EDITH ALLENDORF, Plaintiff-Appellant, vs. GENEVIEVE DAILY and MARTHA DAILY, Defendants-Appellees.	Appeal from Circuit Court of Kankakee County
GENEVIEVE DAILY and MARTHA DAILY, Counterplaintiffs-Appellees, vs. EDITH ALLENDORF, Counterdefendant-Appellant.	

WRIGHT --J.

This is an appeal from a judgment of the Circuit Court of Kankakee County, finding the respondent, Edith Allendorf, hereinafter referred to as plaintiff, guilty of contempt of court for wilfully violating a decree of that court entered on February 17, 1956, and ordering plaintiff to pay a fine in the amount of $100.00 and costs.

On February 17, 1956, a decree was entered in the Circuit

Court of Kankakee County, making certain findings, eight of the pertinent findings being as follows:

(1) That the plaintiff, Edith Allendorf, has by virtue of the terms of an express grant, an easement two rods wide upon the East Half (E½) of the South-west Quarter (SW¼) of Section Twenty-nine (29), Township Thirty (30) North, Range Twelve (12) West of the Second Principal Meridian, in Kankakee County, Illinois, the same to be measured West of a fence line existing at the time of the death of Thomas Daily, Sr., which said fence line was located 18 feet at the North and 13 feet at the South, west of the true government survey line as located by the L. C. Looker survey of 1905 upon which the Dailey vs. Boudreau decision (231 Ill. 228) was based.

(2) That said easement is for the benefit of certain other lands owned by plaintiff in said Section Twenty-nine (29), described as the North Half (N½) of the Northeast Quarter (NE¼); the Northeast Quarter (NE¼) of the Northwest Quarter (NW¼); the South-west Quarter (SW¼) of the Northeast Quarter (NE¼); also 11½ acres off of the East side of the Northwest Quarter (NW¼) of the South-east Quarter (SE¼), all in Section Twenty-nine (29), Township Thirty (30) North, Range Twelve (12) West of the Second Principal Meridian, Kankakee County, Illinois; that the use of said easement by plaintiff be limited to use beneficial to the lands described in this paragraph only.

(3) That plaintiff be restrained from the use of said easement for the benefit of any land other than that specifically described in the paragraph next above.

(4) That the plaintiff be restrained from entering upon or using any part or portion of the East Half (E½) of the Southwest Quarter (SW¼) of Section Twenty-nine (29), Township Thirty (30) North, Range Twelve (12) West of the Second Principal Meridian, Kankakee County, Illinois, except the two rod easement, as described and located in paragraph (1) above.

(5) That the plaintiff be restrained from removing or interfering with gates placed at the ends of the aforesaid easement except opening and closing thereof for lawful passage.

(6) That the plaintiff be ordered to keep said easement in good and proper repair and that the plaintiff be restrained from allowing any water passages across said easement to become blocked or impeded in any manner so as to cause water damage to the lands of the defendants and counter-claimants.

(7) That defendants and counter-claimants be restrained from in any way interfering or obstructing the lawful use of said easement by the plaintiff including the necessary repair thereof by the plaintiff.

(8) That the injunctions herein extend to and be obligatory upon the heirs, executors, administrators, assigns, agents, servants and employees of the parties hereto.

The petition filed herein for rule to show cause alleged that the plaintiff, by and through her agent, Harold Allendorf, trespassed on a portion of the East Half (E½) of the Southwest Quarter of Section Twenty-nine (29), Township Thirty (30) North, Range Twelve (12) West of the Second Principal Meridian, Kankakee County, Illinois, lying West of the two (2) rod easement, as described in said decree of February 17, 1956, and that said agent, acting for the plaintiff, Edith Allendorf, used a portion of the said two (2) rod strip and went through to work on the South Half (S½) of the South Half (S½) of the Northwest Quarter of said Section Twenty-nine (29), the same being non-dominant land.

The petition further alleges that on June 16, 1956, the plaintiff acting by and through her son and agent, Harold Allendorf, caused to be knocked down two (2) Surveyor's stakes set up and placed by the said Charles S. Danner in order to properly locate the East edge of the unburdened portion of the East Half of the Southwest Quarter; and bent two (2) metal fence posts placed on said East edge by the defendants, and the said Harold Allendorf, as said agent for the plaintiff, informed the defendants that the plaintiff was taking thirty-five (35) feet from the fence, re-

ferring to the present fence line.

The petition further alleges that the plaintiff and her agent, Harold Allendorf, in so doing have violated the above quoted portions of the Court's Decree, have trespassed on the land of the defendants despite repeated warnings by the defendants, have used the said easement as set forth in said Court's Decree to benefit other land than that contained in said Decree, and have refused to make any attempt to locate said easement as provided in the said Court Decree, as said dominant holder is under a duty to do.

A motion supported by affidavits was made by the plaintiff to strike the petition for rule to show cause. The motion was denied and a rule was entered on the plaintiff to show cause why she should not be held in contempt of court. A hearing was held, at which petitioners submitted evidence and after which the court without hearing evidence which the plaintiff requested to introduce, entered an order finding the plaintiff guilty of contempt.

The plaintiff cites ten alleged errors which are relied upon by her for reversal. Since a reversal of the judgment of the trial court is required from the record before us, only the following errors relied upon will be considered: First, there is no evidence in the record that Harold Allendorf was the agent of the plaintiff. Second, the court refused to admit proper and competent evidence offered on behalf of the plaintiff.

The pleadings filed herein against the plaintiff allege that she acting by and through her son and agent, Harold Allendorf, did

[illegible]

by her [illegible]

court is [illegible]

errors [illegible]

in the record [illegible] plaintiff.

Second, the court [illegible]

offered on behalf of the plaintiff.

The pleadings filed herein against the plaintiff allege that she acting by and through her son and agent, Donald Allendorf, did

certain acts which were violations of the decree of February 17, 1956. In her sworn answer she and her son, Harold, denied the allegations of the agency.

The only evidence in the record before us as to the alleged agency is found in the testimony of Martha Daily, who testified on this point as follows:

> "Q. What relation is Harold Allendorf to Edith Allendorf?
>
> A. Her son, and according to the papers, in this case, 'agent.'
>
> Mr. Beckers: Ask that be stricken.
>
> The Court: It may be stricken.
>
> Q. For the year 1956, Harold Allendorf farmed the land belonging to Edith Allendorf
>
> A. He farmed a portion of it. Bulb growers farm a small portion."

From a careful review of the record before us we find absolutely no evidence of any agency. The fact that Harold Allendorf is the son of Edith Allendorf is no proof of his agency, White vs. Seitz, 342 Ill. 266, 174 N.E. 371. Proof that plaintiff's son was farming her land is no evidence that the son is the agent of the plaintiff. So far as this record is concerned Harold Allendorf might have been a tenant on plaintiff's land. It was incumbent upon petitioners, who had the burden of proof, to prove the alleged agency and having failed to do so the judgment for contempt against the plaintiff cannot stand.

After the court overruled plaintiff's motion to strike the

petition to show cause and the entry of the order that she show cause, plaintiff filed a motion asking the court to permit her to present oral testimony of witnesses. The court refused oral testimony stating, "There is no need of any further evidence that I can see, nothing for me to do only find the respondent Edith Allendorf in contempt of this Court." For a contempt out of the view and hearing of the court an offender must be allowed to answer and offer evidence in his own behalf. This rule was recognized in Hohenadel v. Steele, 237 Ill. 226, 23[illegible], [illegible] N.E. 71[illegible], 720, wherein it was stated:

> "For a contempt out of the view and hearing of the court an offender must be allowed to answer and offer evidence in his own behalf, otherwise the judgment on such a charge, without a hearing or opportunity to present a defense, has no resemblance to a proceeding in a court of law."

The contention of the petitioners-appellees that the trial court committed error in denying the petitioners' motion to fine and direct the plaintiff to pay petitioners for their damages because of said contemptuous acts of the plaintiff is not properly before this court for the reason that petitioners-appellees did not file and serve a notice of cross appeal as provided by Supreme Court Rule No. 35.

A notice of cross appeal is mandatory if the appellee desires to appeal from all or any part of an order, and unless given the matters sought to be reviewed are not preserved for review and decision by this court, Holmes v. Rolando, 322 Ill. App.

475, 51 N.E. 2nd 784.

For the reasons herein stated, the judgment of the trial court assessing a fine in the amount of $100.00 and costs against the plaintiff, Edith Allendorf, is reversed and the case remanded for a new trial.

Reversed and remanded.

Crow, P.J.
Concurs

Crow, P. J. Concurs

Solfisburg, J. Concurs

Crow, P. J. Concurs

Solfisburg, J. Concurs

47244

17 I.A. 2d 494

MUREL TROWBRIDGE, a Minor, by GLADYS TROWBRIDGE, his Mother and Next Friend, Appellant, v. NORMAN C. BARRY, HENRY WINK SOUTH SIDE STEAM DYE WORKS, a corporation, JAMES J. FINNEGAN, RAYMOND FINNEGAN, MARCELLA FINNEGAN PETERS, and MARGARET FINNEGAN McGOURTY, Defendants, NORMAN C. BARRY, Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a summary judgment dismissing, as a defendant, the owner of the premises in which plaintiff was injured.

Murel Trowbridge, the plaintiff, then 13 years of age, was injured on July 3, 1949, while visiting his cousin, Louise Bowers, and her husband, Fred Bowers, in their second floor apartment at 2546 South Parkway, Chicago, Illinois. In an effort to close a window Trowbridge stepped on the window sill, which gave way, causing him to break the glass window pane with his left hand, and as a result his left wrist was permanently injured.

Trowbridge brought suit for damages for personal injuries and in his amended complaint alleges that on July 3, 1949, Norman C. Barry, as owner, and the other defendants, as lessees, maintained and controlled a two-story frame building at 2544-46 South Parkway, Chicago, Illinois; that a steam and dye cleaning plant occupied the first story and the second story was occupied by two apartments; that the Bowers family had occupied the second story apartment at 2546 for about

two months prior to July 3, as month-to-month tenants; that on the date of the leasing to Bowers, there existed a dangerous and defective condition in the apartment, in that the west window and sill on the north side of the apartment were aged, rotted and in a state of disrepair; that all of the defendants had knowledge or, by the exercise of ordinary care, should have known of the dangerous and defective condition of the window and sill at the time of the leasing of the apartment to Fred Bowers; that it was the duty of each defendant to maintain and keep the apartment free from dangerous defects at the time of the leasing to Bowers, so that Bowers, his family and all visitors might occupy, use the apartment and operate the windows safely; and that because of the negligence of the defendants in not maintaining and keeping the apartment in a safe condition, plaintiff was injured, as above set forth.

Barry, in his answer, admits he owned the building on July 3, 1949; denies that he then maintained or controlled it; alleges that on January 3, 1947, he leased the entire building to James J. Finnegan, for the period from January 3, 1947, to January 3, 1952, and that the lease to Finnegan required Finnegan, his heirs and assigns to keep the premises in repair; denies that he (Barry) had any duty toward plaintiff; and denies any of the alleged acts of negligence.

Barry filed his motion for summary judgment after answering the amended complaint, and in his supporting affidavit says that he was the owner of the premises on January 3, 1947, and until September 1, 1956; that on January 3, 1947,

he entered into a lease with James J. Finnegan, his heirs and assigns, for a period of five years, copy of the lease being attached to the affidavit and made a part thereof; that Finnegan was the owner or lessee of the premises from 1906 until his death, December 17, 1947; that after Finnegan's death, his heirs or Henry Wink South Side Steam Dye Works continued in possession of the premises in accordance with the provisions of the lease, and continued to pay rent thereunder and to be bound by the covenants and conditions of said lease; that the injury of which plaintiff complains occurred on July 3, 1949, which was during the lease period, and that paragraphs 5 and 6 of said lease provided that the lessor would be held harmless from all liability arising out of claims for injury on said property; denies leasing to Fred Bowers or anyone else other than to Finnegan, his heirs and assigns; and denies having any duty to repair the premises or having any knowledge of the alleged dangerous and defective condition of the window and sill.

The lease between Barry and Finnegan is an industrial business lease, with the customary representations and conditions, among which are: that the premises were to be occupied solely for the purpose of cleaning and dyeing, for the term between January 3, 1947, until January 3, 1952; that "Lessee has examined and knows the condition of said premises, and has received the same in good order and repair; * * * Lessee will keep said premises, including all appurtenances, in good repair, * * *; Lessee will not allow said premises to be used * * * for any other purpose than that hereinbefore specified * * *."

Trowbridge's counter-affidavit states he is now twenty-one years of age; that on July 3, 1949, he was visiting the Bowerses in the second apartment at 2544-46 South Parkway; that Fred Bowers had leased the premises from Henry Wink South Side Steam Dye Works, which occupied the lower floor; that the Bowerses had occupied the apartment for two months, and he (Trowbridge) had visited them during this period about every day and saw the windows on the north side of the apartment, which were old, weak, in disrepair, loose, without putty, sash cords or weights, and apparently had not been repaired for many years; that the Bowerses asked him to close the west window on the north side of the apartment and, in so doing, he stepped on the window sill, which gave way, causing him to throw out his left hand, striking the window pane, which broke and cut his left wrist, severing the tendons thereof, resulting in 75% loss of the use of his left hand.

On April 17, 1957, the trial court sustained the Barry motion for summary judgment and dismissed Barry as a defendant, and plaintiff appealed.

The question before us is whether there are triable issues of fact raised by the pleadings, supporting affidavits and exhibits; if so, the judgment order ought not to have been entered. J. J. Brown Co., Inc. v. J. L. Simmons Co., 2 Ill. App. 2d 132; 23 I.L.P., Ch. 5, §73.

An examination of the amended complaint and the counter-affidavit of Trowbridge shows that Trowbridge does not deny the lease or any of its provisions. Therefore, as between Barry and Trowbridge there is no lease issue of fact, as under section 40 of the Civil Practice Act, every allegation not explicitly denied is admitted.

It is the general rule, in the absence of an agreement to the contrary, that the lessee of an entire building, and not the owner thereof, is liable for injuries received by third persons, as a result of a failure to keep the building in repair. But where an owner leases property with actual or constructive notice of a defective and dangerous condition, which remains uncorrected, the owner, notwithstanding the lease, is liable to strangers for injuries caused, to the same extent as if he were in control and possession of the property. It is generally true that infants have no greater rights to go upon the lands of others than adults, and their mere minority imposes no duty upon land owners to expect them or prepare for their safety, in the absence of a dangerous attraction, where the owner knows that small children customarily play on the property. Wagner v. Kepler, 411 Ill. 368, 371, 372.

There being no claim that the window sill was a dangerous attraction where small children customarily played, and following the above rule, it was incumbent upon plaintiff to allege facts to show that the window sill in question was defective on January 3, 1947, the date of the original leasing from Barry to Finnegan, or that there was a covenant by Barry to repair. Marcovitz v. Hergenrether, 302 Ill. 162; Nacon v. Isaacson, 320 Ill. App. 689. Trowbridge alleges the defective condition existed on July 3, 1949, and for two months prior thereto, because he saw it almost daily from the beginning of the Bowers tenancy. The lease relieved Barry from any duty to repair. No facts are alleged to show that owner Barry had any actual or constructive notice of the defective condition of

the window at any time prior to July 3, 1949. We believe that the pleadings and summary judgment affidavits and exhibits show this situation to come within the general rule above set forth, and that owner Barry, as lessor of an entire building on January 3, 1947, is not liable for the injuries received by Trowbridge on July 3, 1949, while an invitee of a subtenant. This conclusion effectually disposes of various ~~conclusions~~ questions of law which are urged upon us by plaintiff as issues of fact. These questions have to do with the construction of the Barry-Finnegan lease.

As we have decided this case on the common law landlord and tenant rule, it is unnecessary to discuss or decide the effect of the alleged exculpatory clauses contained in the lease and what effect is to be given where a minor is involved.

Plaintiff complains of the trial court not disposing of his motion to dismiss the Barry motion for summary judgment before proceeding to hear the summary judgment motion and counter-affidavit. The order of March 14, 1957, indicates this hearing was set on plaintiff's own motion, and we must conclude that plaintiff did not call his pending motion to the court's attention, thereby causing the complained of procedure himself. We do not see here any error on the part of the court.

As the record fails to show a triable issue of fact, the judgment of the trial court is affirmed.

AFFIRMED.

KILEY, P.J., and LEWE, J., CONCUR.

ABSTRACT ONLY.

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171 I.A.2d 495

47293

WILLIAM HOLZMANN and AUGUSTE HOLZMANN, Plaintiffs-Appellants, v. ROBERT HOLZMANN, Defendant-Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a proceeding in equity to set aside a foreclosure decree entered in the case of Robert Holzmann, defendant here, versus William and Auguste Holzmann, plaintiffs here. The suit was dismissed on motion of defendant and plaintiffs have appealed.

The foreclosure decree was entered November 16, 1953; William and Auguste Holzmann's appeal to this court resulted in an affirmance of the decree (4 Ill. App.2d 82); and their petition for leave to appeal to the Supreme Court was denied.

The instant complaint alleges that "their suit in equity, contains the same parties and the same issues" as in this proceeding. The allegation is supported by a comparison of the instant complaint and the opinion of this court in the appeal from the foreclosure decree. Thus William and Auguste Holzmann's instant suit is barred under the rule of res judicata.

This suit is not a supplemental bill filed "in the same cause" and covering matters arising after the foreclosure suit was filed. The case of Gage v. Parker, 178 Ill. 455, is therefore not applicable on the res judicata question. The

foreclosure suit was # 51 C 7717 in the Circuit Court with decree entered November 16, 1953. The instant suit, begun in April, 1957, is an independent proceeding having Superior Court # 57 S 4827. Furthermore, the complaint before us merely alleges that the foreclosure decree did not "sufficiently" adjudicate matters then before the court.

The decree dismissing the suit is affirmed.

AFFIRMED.

LEWE AND MURPHY, JJ., CONCUR.

ABSTRACT ONLY.

A

47392

17 I.A. 2d 495

IRENE J. PREIS, Appellant, v. EUGENE K. PREIS, Appellee.	APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a separate maintenance action. The court heard evidence, found for defendant and dismissed the complaint for want of equity. Plaintiff has appealed.

The parties were married October 14, 1934, and are the natural parents of Lorelei, about twenty years of age, and the adoptive parents of Eugene, about two and a half years of age. In October, 1956, the husband, Dr. Eugene Preis, left the family residence and entered a hospital where he stayed until November. He then went to Florida until the middle of February of 1957 when he returned to Chicago and has since, except for two days, lived apart from his family.

The question is whether the finding of the chancellor that plaintiff was not without fault in the separation is against the manifest weight of evidence.

The husband attempted suicide in October, 1956, was hospitalized and when discharged, November 16, 1956, went to live with Chicago friends instead of returning home. He sent friends for his clothes and except for two nights in July, 1957, has never returned to the family home. Plaintiff and the children have remained in the home.

The parties, therefore, are living separate and apart and the issue before the chancellor was whether plaintiff was or was not at fault for the separation. We see no basis for an inference that she was at fault. The actual separation was due to his attempted suicide which resulted in his being carried away to the hospital. There is nothing in the record to suggest that his attempt on his own life was reasonably due to any conduct of hers. He has not since returned to the family home to resume the marriage relation. He did return for two nights, nine months after the separation, but the record clearly discloses the purpose was not to end the separation. His conduct since leaving the hospital has evinced an attitude of wilful purpose to live a way from his wife. Moyer v. Moyer, Gen. No. 47246, opinion filed by this court May 13, 1958.

We need not consider any other testimony. We think the decree is against the manifest weight of the evidence and should be reversed. McCarthy v. McCarthy, 219 Ill. App. 369, 386. The record plainly shows that plaintiff is entitled to separate maintenance. Bertram v. Bertram, 346 Ill. App. 314.

The Doctor was ordered out of the family home in July, 1957, on motion of plaintiff and thereafter moved to vacate the order. The record does not show that the motion to vacate was disposed of. We presume in favor of the order that there was good ground for compelling the Doctor to leave the house. In view of the Doctor's wilful separation for the

several months preceding and the circumstances which attended the original separation, we distinguish the instant case from Baumgartner v. Baumgartner, 16 Ill. App.2d 286.

For the reasons given the decree is reversed and the cause remanded with directions to determine the suitable alimony and child support and to enter a decree for separate maintenance accordingly.

REVERSED AND REMANDED
WITH DIRECTIONS.

LEWE AND MURPHY, JJ., CONCUR.

ABSTRACT ONLY.

Gen. No. 11138 Agenda 13

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - SECOND DIVISION

FEBRUARY Term, A. D. 1958

ALVIN BETIG, Plaintiff-Appellee, -vs- FRANK C. ASHLEY, executor of the Estate of MARIE A. ASHLEY, Deceased,	Appeal from Circuit Court, Ogle County, Illinois.

CROW, A. J.

The plaintiff-appellee, Alvin Betig, brought suit to recover damages for alleged personal injuries and for damages to his automobile, against the defendant-appellant, Frank C. Ashley, executor of the estate of Marie A. Ashley, deceased. The jury awarded him $20,000.00. A judgment was entered on the verdict, and the defendant appeals.

The defendant contends (1) there is no sufficient or competent evidence that the plaintiff was in the exercise of due care, that none of the acts of negligence charged against the decedent were proven, and that, if there were any, they were not the proximate cause of the occurrence; (2) the trial court erred in not striking paragraphs 4 and 5 of the plaintiff's complaint, charging certain acts of negligence, for lack of evidence; (3) the trial court erroneously gave the plaintiff's instructions

Nos. 12 and 16; and (4) the verdict is against the manifest weight of the evidence.

The plaintiff alleged in his complaint, par. 4, that the decedent Marie Kelley negligently operated her automobile in such a manner as to cause it to strike and run into the truck driven by the plaintiff. Paragraph 5 charges that the decedent, Marie Kelley, was guilty of certain acts of negligence, namely:

> (a) Negligently operated said automobile.
>
> (b) Negligently operated said automobile on the left half of the roadway, contrary to the provisions of CHAP. 95½, Sec. 151, ILL. REV. STATS.
>
> (c) Negligently turned or attempted to turn said automobile from a direct course upon said highway when such turning could not be done in a safe manner.
>
> (d) Negligently failed to keep a proper lookout for traffic approaching upon said highway.
>
> (e) Negligently operated said automobile at a speed that was greater than was reasonable and proper having regard to the traffic and the use of the way.

The defendant denied all the allegations of the complaint. No questions are raised on the pleadings.

Marie M. Kelley, the defendant's decedent, the driver of one of the cars, was dead after the collision. The plaintiff was, of course, incompetent to testify under the Evidence Act, and there were no other eye witnesses to the collision or impact.

The defendant's motions at the close of the plaintiff's case and at the close of all the evidence for a directed verdict were denied. The defendant requested and the Court submitted

this special interrogatory: "Does the jury find that the plaintiff has proven by the greater weight of the evidence that defendant's intestate, Marie A. Kelley, was guilty of one or more acts or omissions constituting negligence as alleged in the complaint?" The jury answered the interrogatory in the affirmative. The defendant's post trial motion for judgment notwithstanding the verdict or for a new trial was denied. During the trial the defendant's motion to strike paragraphs 4 and 5 of the complaint, for lack of evidence, was overruled.

The evidence, including the photographs, which we've examined, indicates, in substance, so far as material, that the plaintiff, Alvin Betig, 56, in good health, at about 4:30 p.m., January 13, 1955, was driving his new pick-up truck in a northerly direction on U. S. Highway No. 51, a north-south highway, about two and one half miles north of Rochelle, Illinois, at a point in the open country, and the defendant's decedent, Marie A. Kelley, was apparently driving a Packard automobile in a southerly direction on the same highway. After the collision the decedent's Packard automobile was found almost entirely off the east side of the highway, the right rear wheel only being on the pavement, headed south, at an angle, and about 124 feet south of it was the plaintiff's truck, about 10 feet off the east edge of the highway, facing north. The entire front ends of both vehicles were smashed in, the damages to each being entirely and directly across each front end. Marie Kelley was lying with her head and shoulders on the ground and her feet and legs still in the car. She was dead.

There was debris, oil, and antifreeze in the east lane of the highway and on the east shoulder of the road, but there was no debris west of the center line of the road. There were no skid marks on the pavement. At and from the point of collision the road is straight and practically level for more than a mile in either direction. The weather was clear, it was daylight, and the road was clear and dry. No witness saw the Kelley car until after the collision. It had been driven or pushed backwards (north) less than a car length from the point of impact, - it was near the debris afterwards, - but the Detig truck had been driven or pushed backwards (south) approximately 110 feet from the point of impact, - from the place where the debris was. The highway is 24 feet wide, consisting of two lanes of traffic, one north and one south. The Detig truck left tire tracks off of the east edge of the road from the debris to where the truck was found, - apparently as it travelled backwards after the impact. The point of impact, where the debris was, was approximately 100-200 feet south of an adjacent rural school house west of the highway and a bill board east of the highway.

There were several people who saw the plaintiff Detig's truck immediately before the accident.

Henry Ehman, a carpenter, was working on a new house on the Boltman farm, a little south of the point of impact and west of the highway. He saw Detig drive by, did not see the collision, heard a crash, and saw the truck going backwards a few feet. He first saw the Detig truck going north on the highway, slowly, maybe 20-25 miles an hour, as a gasoline truck was going south.

Detig was on his own side of the road as far as Ehman could see, though Ehman was some distance from the highway and took no particular note. He said none of the debris or oil was west of the center line, - it was on the ground on the shoulder on the east side. The house he was working on was about 200 yards south of the point of impact, and the impact was maybe a couple of hundred feet, maybe 300, south of the school house.

LaVerne Krahenbuhl drove a school bus on the day in question, and was driving south on the highway when he met the plaintiff Detig about half way between the school house and the Boltman house. They waved at each other. Detig was headed north. Detig was going around 35 m.p.h., and was in his own lane, the east lane, for northbound traffic. The witness said he was not a good judge of distance, but that he must have met Detig 100 to 150 yards south of the school house. He did not see the collision. And he had not seen the Kelley car before the occurrence.

Dean Shaw was travelling north on Highway No. 51, and as he came over the rise of a hill he saw Mr. Detig's truck coming backwards on the right hand (east) side of the road. It was on the right shoulder of the road, facing north. He first saw the Detig truck when it was about 100 feet north of where it came to rest, and he saw it move backwards, south about 100 feet. The Kelley car was entirely off the road, on the east side thereof, except the right rear wheel, and was facing south. Mrs. Kelley was partly in and partly out of the car. Her head and shoulders were out of the car on the left hand side. No one else was in the car with her. The door on the driver's side was open. He

was the first one there. He first went to the Betig truck and then to the Kelley car. He wasn't sure then that she was dead. The Kelleycar was standing still when he first saw the Betig truck moving backwards. He did not see the collision, nor had he seen the Kelley car before or at the time of the collision.

Two witnesses, who had known the plaintiff many years and frequently ridden with him, also testified, in substance, that his general reputation as a driver in the community was good.

The plaintiff was severly injured, and his truck, which was new, was badly damaged, but since there is no objection here to the size of the verdict, as such, we will not discuss his injuries or the amount of his damages or the size of the verdict.

The defendant offered no evidence.

This case is based principally, but not entirely, on circumstantial evidence. That however, was, to that extent, the highest degree of proof available under the circumstances, and it must be accorded the same judicial concern as are other types of evidence: ROBERTSON v. BOHMAN (1956) 9 Ill. (2) 420; controverted facts may be said to be established when the evidence, though circumstantial, creates a greater or lesser probability leading, on the whole, to a satisfactory conclusion, - that is all that can reasonably be required, - and the jury may act on reasonable inferences arising from undisputed or established facts, - whether established by circumstantial or other evidence, - inferences of that type do not lie in the realm of conjecture: ROSENFIELD v. INDUSTRIAL COMM. et al. (1940) 374 Ill. 176. Cf. U. S. BREWING CO. v. STOLTENBERG (1904) 211 Ill. 531.

The witnesses who were at the scene of the collision after-

wards testified to facts from which the jury could reasonably draw the inference that the apparent point of impact was east of the center line in the northbound traffic lane, or perhaps east thereof. The debris, oil, etc., were all in that lane or at the east edge of the pavement, and on the shoulder east of the pavement. There was no debris, etc. west of the center line in the southbound traffic lane. The fronts of the two vehicles were entirely smashed in, each completely across the front end, indicating, reasonably, a direct frontal impact, or head-on crash, - n t a sideswiping accident. The direction of travel and position on the highway of the plaintiff's truck immediately before, the apparent direction of travel and position on the highway of the defendant's decedent's car immediately before, the nature of the area and highway concerned, the time and current weather conditions, the position of the debris, oil, etc., and the location of the vehicles afterwards, - the plaintiff Detig's truck off the pavement on the east shoulder, and the defendant's decedent's car almost entirely off the pavement on that same east shoulder, their condition as to the frontal parts of the vehicles that were damaged, the tire tracks on the east shoulder leading back to the Detig truck, the direction the vehicles were facing afterwards, directly toward each other, the seeing of the Detig truck moving backwards on the east shoulder immediately afterwards from the point of impact, the very small distance the Kelley car was pushed backwards by the impact, and the rather long distance the Detig truck was pushed backwards by the impact, and the absence of skid marks on the pavement, all support the allegations of negligence on the part of the decedent Marie Kelley, and from

which the jury could reasonably draw that conclusion.

There are no facts in evidence inconsistent with the factual inference that the defendant's decedent violated the section of the statute referred to in the plaintiff's Instruction No. 12, relating to drivers proceeding in opposite directions passing to the right and giving to the other at least one half of the roadway where there is not more than one lane of traffic in each direction. The circumstantial evidence stated above and the testimony of the witnesses who observed the plaintiff's driving of his truck before and saw its movements afterwards, its apparent speed and location on the highway, indicate, or furnish a reasonable basis from which the jury could infer that the decedent's car was being driven at the time of and shortly before the impact in the east lane of the paved highway, that being the wrong side of the road for southbound traffic. A reasonable inference could be drawn from the evidence relating to what happened to the vehicles after they came together as to the speed of each vehicle, and the relative speeds thereof, and the jury could reasonably determine from this and the other facts and circumstances in evidence that the defendant's decedent was travelling at a speed greater than was reasonable and proper having regard to the traffic and use of the way, that the plaintiff before the impact was in his correct east lane or northbound lane of travel or off or partially off on the east shoulder, was probably not travelling at an unreasonable rate of speed, and, taking into account the further evidence as to his age and good health and the newness of his truck, and his general reputation, plaintiff was in the exercise of due care under the circumstances. When there is no eye witness to an accident who is

competent to testify to the facts which caused the accident testimony of the habits and due care of the plaintiff, or plaintiff's decedent is properly admissible, and that testimony itself may make a prima facie case of due care on the part of the plaintiff: HAWK v. BROOKS et al. (1947) 331 Ill. App. 535. Due care of the plaintiff may be proved in the same manner as negligence of the defendant, and by circumstantial evidence as to the facts and circumstances prior to and at the time of the collision, as well as by direct evidence: HAWK v. BROOKS et al., supra; KUSLANTINI vs. STEFFEN (1953) 414 Ill. 70.

KUSLANTINI vs. STEFFEN, supra, was a case involving facts similar to those here, and it also was chiefly based on circumstantial evidence, but there was no evidence, as there is here, of the plaintiff's health or habits creating a presumption of due care, and there the determination was favorable to the party in the position of the present plaintiff. HALLING etc. v. LOMELINO et al. (1941) 309 Ill. App. 369, is another case involving facts similar to the present case, and a judgment for the plaintiff was affirmed; to apply the substance thereof here, the evidence reasonably and fairly tended to prove that the plaintiff's truck was being driven north on the east half of the highway, where normally and in the exercise of reasonable care he had a right to drive, and that all or a portion of the decedent's car was being driven south on that same east half in the path of the plaintiff's truck, where normally and in the absence of explanation that car could not properly be driven, and the defendant did not attempt by evidence to justify or explain such position of that car.

POWELL et al. v. THE MYERS SHERMAN CO. (1941) 309 Ill. App. 12 affirmed a judgment for the parties in the position of the present plaintiff in another head-on collision case. KIDDRIDGE v. BOISMENUE etc. (1943) 319 Ill. App. 383 reached the same conclusion on facts and a state of proof remarkably close to those of the case at bar. And HAHN v. BROOKS et al., supra, another head-on collision case, involving facts similar to those here, and a state of proof not unlike that here, also affirmed a judgment for the plaintiff, and the Court said there was sufficient evidence to sustain the verdict on the question of the defendant's negligence, and there was sufficient circumstantial evidence of due care to make that question one of fact and not of law.

The defendant suggests the decedent's car may have been travelling south in the northbound lane at a slow rate of speed for a long distance, in plain sight of the plaintiff; or it may have been going south in the southbound lane, the plaintiff crossed into that lane, and the decedent took evasive action; or she may have stopped on the highway; or the decedent may have suffered some sudden illness or incapacity; or there may have been a mechanical breakdown in her car. To adopt any of those views on this record would be to violate the very rules the defendant is contending for, because there is no evidence at all to support any such speculations. Some of them are matters exclusively in the control of the defendant to adduce proof tending to sustain them, and he did not do so. The existence of those other suggested facts, which would be inconsistent with the inferences actually drawn by the jury, cannot be inferred from the same evidence with equal certainty. A representative group of the cases cited by the defendant, - COULSON v. DISCARNS (1946) 329 Ill. App. 28, PURE TORPEDO CORP. v. NATION (1945) 327 Ill. App.

28, TUTHILL v. BALT RAILWAY CO. (1908) 145 Ill. App. 50, PAUL HARRIS FURNITURE CO. et al. v. MORSE et al. (1955) 7 Ill. App. (2) 452, ILLINOIS STEEL CO. v. BYCYANSKI (1902) 106 Ill. App. 331, GALNER v. PRATHER (1939) 301 Ill. App. 224, and JACOBS v. ILL. NATL. BK. etc. (1951) 345 Ill. App. 30 involved facts and issues not similar to those here involved and are not persuasive.

It was for the jury to determine the credibility of the witnesses and the weight to be accorded the evidence. The verdict is not against the manifest weight of the evidence. There is substantial evidence supporting the verdict and we are not justified in disturbing the judgment of the jury as to the weight thereof or its probative value: ADDEY v. IRIBA (1954) 2 Ill. App. (2) 9. An opposite conclusion is not clearly evident: GRENN et al. v. KEEHAN (1956) 10 Ill. App. (2) 53. If it was a question of fact as to the negligence of the defendant's decedent or the contributory negligence of the plaintiff, and we think it was, the verdict will not be overruled unless clearly and palpably erroneous: WALLIS et al. v. VILANTI (1954) 2 Ill. App. (2) 446. The jury by its general verdict, as well as more particularly by its answer to the special interrogatory, has spoken, and there is a reasonable basis in the evidence for its conclusions.

The trial court did not err in declining to strike, on the defendant's motion, par. 4 and par. 5, (a), (b), (c), (d), and (e), of the plaintiff's complaint, relating to alleged negligence, for lack of evidence. What we've said as to the evidence sufficiently covers this point.

The plaintiff's Instruction No. 12, complained of by the defendant, is as follows:

"The court instructs the jury that at the time of the occurrance in question there was in full force and effect a statute of the State of Illinois which provided, among other things, as follows:

'Drivers of vehicles proceeding in opposite directions, except as provided in Section 54, shall pass each other to the right and upon roadways having width for not more than one lane of traffic in each direction each driver shall give to the other at least one-half of the main traveled portion of the roadway as nearly as possible.'

Section 54 provided, among other things as follows:

'Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

2. When the right half of a roadway is closed to traffic while under construction or repair;

3. Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or

4. Upon a roadway designated and sign-posted for one way traffic.' "

The instruction is accurate in and of itself; the first part is literally, Section 55 of the Uniform Act Regulating Traffic on Highways, - CH. 95½ ILL. REV. STATS., 1957, par. 152; the second part is a portion of Section 54 of that act, - CH. 95½ ILL. REV. STATS., 1957, par. 151, - and although not including all of Section 54 the omitted parts are not material to this case, and the instruction does not purport to state all of Section 54. No error is committed by giving an instruction in the substantial language of a statute; the instruction must be regarded as sufficient when it lays down a rule in the words of the law itself: WARD v. MEREDITH (1906) 220 Ill. 66. An instruction given in the language of the statute, which is pertinent to the issues, may be regarded as sufficient: HAHN v. BROOKS et al., supra, where an instruc-

tion which was a copy of Section 5 of this statute was held not to be error. In view of the evidence, we find no reversible error here in this instruction. It is applicable to the facts. There is evidence upon which it can be based. As the defendant urges, instructions should be predicated onthe evidence: I.C.R.R. CO. v. SANDERS (1897) 166 Ill. 270; GEISSLMAN v. STROBECK (1939) 302 Ill. App. 23. But this instruction does not violate that principle. We cannot say there is no evidence to support it.

The plaintiff's Instruction No. 16, also objected to by the defendant, is as follows:

> "You are instructed that the violation of a statute regulating traffic is prima facie evidence of negligence.
>
> Prima facie evidence of negligence is evidence which is sufficient to prove negligence unless and until it is rebutted by evidence of equal weight. The prima facie evidence of negligence, if any, must prevail unless it is neutralized or offset by evidence of equal weight."

This instruction apparently was derived in part from the opinion in SHELLABARGER ELEVATOR CO. v. ILLINOIS CENTRAL R. R. CO., 212 Ill. App. 1, where the Court said, in part:

> "Prima facie evidence is not conclusive evidence, but is evidence sufficient to prove the averment of which it is prima facie evidence unless and until it is rebutted by evidence of equal weight. The prima facie evidence must prevail as to such averment unless it is neutralized or offset by evidence of equal weight " * * * * * *".

Where two facts are so related to each other that normally in reason and human experience the existence of one may fairly be inferred from the other, if one has a tendency to prove the other, the law, - established by case precedents, or

by a statute, or ordinance, - may declare that proof of one shall be prima facie evidence of the other inferred fact; it is sufficient to authorize the finding of the fact inferred unless contradicted or explained; the term "prima facie" necessarily implies evidence which may be rebutted; it does not change the burden of proof, but only the burden of introducing further evidence; the only effect is to create the necessity of evidence to meet the prima facie case created and, if no proof to the contrary is offered, it will prevail: JOHNSON v. PENDERGAST (1923) 308 Ill. 255; MORRISON v. FLOWERS (1923) 308 Ill. 189. A prima facie case is one which will support a judgment unless other evidence is introduced: ANLICKER et al v. BRESTAURST et al. (1928) 329 Ill. 11. The violation of a statute is prima facie evidence of negligence and constitutes a prima facie case of negligence if the violation caused the injury: U. S. BREWING CO. v. STOLTENBERG, supra; NEY v. YELLOW CAB CO., (1954) 2 Ill. (2) 74. A violation of a statute prescribing a duty for the protection and safety of persons is prima facie evidence of negligence, if the violation caused or contributed to cause the injury: HILL et al. v. MILES (1941) 309 Ill. App. 321. Cf. CARROLL v. KRAUSE (1938) 295 Ill. App. 552. If the jury believed from the evidence and the reasonable inferences therefrom, - and they might,- that the defendant's decedent's car was on the east half of the highway in the path of the plaintiff's automobile, it was improperly in such position, and that is prima facie evidence of negligence, - the question as to the truth of the testimony being

one of fact for the jury: MELLEIO v. LOMELINO et al., supra. Violation of one of the particular statutes here involved, Section 54, has been held to be prima facie evidence of negligence: WILLIAMS v. YELLOW CAB CO. et al. (1956) 11 Ill. App. (2) 112. It has even been held, in a somewhat comparable situation, under the statutes here concerned, that if the jury believed from the evidence that the plaintiff was driving in his proper lane of traffic, at a reasonable rate of speed, and the defendant drove across the center black line head-on into the plaintiff, that would be evidence to sustain a wilful and wanton count in the complaint: POWELL et al. v. THE MYERS SHERMAN CO., supra.

We do not find any reversible error in the giving of this instruction in view of its character, language, the facts in evidence, and of the other instructions given relating to proximate cause, particularly defendant's instruction No. 6 and plaintiff's instruction No. 7, and of certain other instructions given relating to the burden of proof as to negligence, and circumstantial evidence. The complained of instruction, plaintiff's Instruction No. 16, is not peremptory, and it and the other instructions are to be read and considered as a series, and so considered, they correctly state the law. Though abstract in character and not made applicable to the facts, and possibly subject to some criticism on that account, it is accurate in and of itself, it is applicable to the facts, and is not reversible error to give it because of its abstract character. The defendant was at liberty to, but did not, offer any evidence to seek

to meet at least prima facie case of negligence under the statutes. What is the proximate cause of an injury is ordinarily, and was here, a question of fact for the jury from a consideration of all the evidence, - it can be raised as a question of law only when the facts are not disputed and where there can be no difference in the judgment of reasonable men as to the inferences to be drawn therefrom: HILL et al. v. HILES, supra.

The arguments of the defendant that violation of a statute regulating traffic is not negligence per se, or conclusive evidence of negligence, and that an instruction that mere violation of a traffic regulation is negligence constitutes reversible error, are not applicable here in any event because the complained of instruction does not contain those words. Of the remaining Illinois cases cited by the defendant on this, PEOPLE v. MCCURRIE (1929) 337 Ill. 290 was a criminal case under the Illinois Prohibition Act; an instruction relating to the possession of liquor used the words "prima facie"; the Court said it condemned the practice of using "prima facie" in an instruction; but there was evidence presented by the defendant there which overcame the prima facie case and the instruction, accordingly, should not have been given in any event; furthermore, under the evidence in that case such instruction was not reversible error and the judgment was affirmed; PEOPLE v. SIKES (1927) 328 Ill. 64, was also a criminal case for manslaughter arising out of the operation of an automobile; an instruction was given that driving a car at a speed greater than permitted by statute was prima face evidence of running at a speed great-

er than reasonable and proper; the gist of the offense there, however, was criminal negligence, - gross or wanton negligence, - not ordinary negligence; and the instruction was held to be confusing, and for that and other reasons the judgment was reversed; PEOPLE v. TATE (1923) 316 Ill. 52 was another criminal case under the Illinois Prohibition Act; an instruction similar to that involved in PEOPLE v. MCCURRIE, supra, was held error, because not based on the charge contained in the indictment, and because where the defendant introduces evidence disputing the facts charged, and there is a contest on the evidence, then no instruction as to what constitutes a prima facie case should be given, and for that and other reasons the judgment was reversed. CROSH v. ACOM et al. (1927) 325 Ill. 474 was a will contest case in which instructions were given that the certificate of the oath of the subscribing witnesses was prima facie proof of the validity of the will; the court said such was error where there was actual evidence on both sides as to the testator's testamentary capacity, - the instruction, under those circumstances, was confusing, - but, under the facts, that, in any event, was not reversible error; and it is of interest to observe that the Court also said there that if the only evidence in the case had been the evidence which made the prima facie case then an instruction as to what makes a prima facie case would have been very proper and necessary. Those cases are not persuasive that the complained of instruction here given is, under the facts and circumstances here in evidence, reversible error.

We find no reversible error, and the judgment will be affirmed.

Concur Stolfus J

AFFIRMED

Wright J. concurs

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A. D. 1958.

General No. 10159

Agenda No. 12

The Humane Society of Springfield and Sangamon County, a corporation, Plaintiff-Appellee, vs. City of Springfield, a municipal corporation, Defendant-Appellant.	Appeal from the Circuit Court of Sangamon County.

REYNOLDS, J.

The plaintiff sued the City of Springfield, Illinois, for $11,000.00 alleging conversion by the City of certain property of the plaintiff. The suit was tried before a jury and a verdict was returned in favor of the plaintiff and against the defendant in the amount of $9,500.00. Judgment was entered on the verdict and from that judgment the defendant appeals to this court.

SEVENTH JUDICIAL
APPELLATE COURT
FILED DECEMBER

December, ..., 1928.

19T.A.352

General No. 10135 | Appeal No. 1.

The Humane Society of Springfield and Sangamon County, a corporation,

Plaintiff-appellee,

vs.

City of Springfield, a municipal corporation,

Defendant-appellant.

Appeal from the Circuit Court of Sangamon County.

OPINION, 1.

The plaintiff sues the city of Springfield, Illinois, for $11,000.00 alleging conversion by the city of certain property of the plaintiff. The suit was tried before a jury and a verdict was returned in favor of the plaintiff and against the defendant in the amount of $9,000.00. Judgment was entered on the verdict and from that judgment the defendant appeals to this court.

While there are quite a few contradicted matters in the case, certain facts seem to be without question. The defendant is the owner and has been the owner for many years of a tract of approximately 42.70 acres of land located on the old waterworks road north of the city, and the property alleged to have been converted was on this land, In 1942, the City of Springfield entered into a lease agreement with the United States Government leasing approximately 29 acres to the Government for use by the National Youth Administration, the term of the lease to be for a term of two years ending August 31, 1944. The government was to maintain the grounds, bear the cost of all buildings erected thereon, and to retain title to such fixtures, structures and additions placed thereon. It does not appear that this lease was ever formally terminated. In 1944 the City issued a land permit to the Board of Education, and the Board of Education obtained from the Government a permit to use the buildings and equipment therein, for use in a vocational education program. A lease was executed to the Board of Education by the City whereby the improvements on the premises were to go to the Board of Education. Afterwards, the Board of Education obtained title from the government for the equipment and buildings. In 1948, the Board of Education turned over the buildings and equipment to the City and the lease was terminated. Shortly afterwards, in 1948, three members of the City Council of the City met

While there are quite a few contaminated sites in the case, certain tracts seem to be without guest [illegible]. The [illegible] is the owner and has been the owner for many years of a tract of approximately 45.70 acres of land located on the sewage-works road north of the city, and the property alleged to have been converted was on that land. In 1944, the city of Springfield entered into a lease agreement with the United States Government leasing approximately 20 acres to the Government for use by the Missouri Youth Administration, the term of the lease to be for a term of two years ending August 31, 1944. The government was to maintain the grounds, bear the cost of all buildings erected thereon, and to retain title to such fixtures, structures and additions placed thereon. It does not appear that this lease was ever formally terminated. In 1944 the City issued a land permit to the Board of Education, and the Board of Education obtained from the Government a permit to use the buildings and equipment therein for use in a vocational education program. A lease was executed to the Board of Education by the City whereby the improvements on the premises were to go to the Board of Education. Afterwards, the Board of Education obtained title from the government for the equipment and buildings. In 1948, the Board of Education turned over the buildings and equipment to the City and the lease was terminated. Shortly afterwards, in 1949, three members of the City Council of the City met

with representatives of the Humane Society of Springfield and Sangamon County, the plaintiff herein, and an oral agreement was entered into whereby the Society was to have the use of one of the buildings to be used as an animal shelter. There is some dispute as to the actual terms of the oral agreement, but it is not disputed that the City did turn over to the Society the building and the use of the ground. It was understood that the title of the land remained in the City, and that the City might terminate the agreement at any time it desired. The Society took over the building, which was in bad state of repair, repaired it, and used it as an animal shelter in conjunction and cooperation with the city in its operation of a dog pound. Animal pens were built, and other improvements made, and afterwards a small house was moved by the Society to the site of one of the Government buildings for its caretaker. The buildings erected by the Government seem to have been sectional or removable type of buildings, bolted to concrete foundations. The two organizations worked in harmony until April 1956, and during this period of time, the City paid part of the expenses of operating the shelter, furnished water and electricity, and used its employees from time to time in helping build or put in some of the improvements. On April 19th, 1956, the City passed a resolution terminating the agreement with the Society, and notified the Society that it was taking possession of the animal shelter immediately.

with representatives of the humane society of Portsmouth and Dangerfield County, the plaintiff herein, in an oral agreement was entered into whereby the society was to have the use of one of the buildings to be used as an animal shelter. There is some dispute as to the actual terms of the oral agreement, but it is not disputed that the city did turn over to the society the building on the site of the shelter. It was an error that the title of the land residing in the city, and the city right to lease the property and to enter into agreement, the society took over the building, which was in need of repair, repaired it, [illegible] and [illegible] for its conduction and operation. The city is the only in the operation of a dog pound. [illegible] paid a rent with [illegible] made, and attempts a small [illegible] by the society to the size of one of the [illegible] shelter. The building erected by the government seem to have been sections or removable [illegible] buildings, bolted to concrete foundations. The two [illegible] worked in harmony until April 1956, and during this period [illegible] the city paid part of the expenses of operating the shelter, furnished water and electricity, and used its employees from time to time in helping build or put in some of the improvements. On April 18th, 1956, the city passed a resolution terminating the agreement with the society, and notified the society that it was taking possession of the animal shelter immediately.

The City did take possession of the Society's animal shelter building, caretaker's house, and various equipment. The Society demanded the return of its property, which was refused by the City and the present suit was instituted. In the testimony produced, the value of the property, both the animal shelter, the pens, the caretaker's house and the equipment was estimated by competent witnesses, and the verdict was within the range of these estimates.

The issues involved, reduced to their simplest element devolve upon the single question, whether or not the Society owned the property, or it was owned by the City. The ownership of the real estate is without question in the City.

The defendant assigns eleven points as error, which reduced again to the actual points at issue, consist of the question of ownership or right of possession of the plaintiff, the validity of the agreement between the City and the Society, the admittance of improper testimony, and exhibits, and the refusal of the trial court to give two instructions on behalf of the defendant.

The testimony on the part of the plaintiff shows that the building which afterwards was used as the animal shelter by the Society, was in a very bad state of repair at the time the Society took over. The Society made extensive repairs and improvements at its own expense, with the tacit consent and permission of the City. During the eight years of

The City did take possession of the Society's animal shelter building, caretaker's house, and various equipment. The Society demanded the return of its property, which was refused by the City and the present suit was instituted. In the testimony produced, the value of the property, with the animal shelter, the cows, the caretaker's house and the equipment was estimated by competent witnesses, and the market was within the range of these estimates.

The issues involved, reduced to their simplest element revolve upon the single question, whether or not the County owned the property, or it was owned by the City. The ownership of the real estate is without question in the City.

The defendant assigns eleven points as error, which reduced again to the actual points at issue, consist of the question of ownership or right or possession of the plaintiff, the validity of the agreement between the City and the Society, the admittance of improper testimony, and finally, the refusal of the trial court to give two instructions requested of the defendant.

The testimony on the part of the plaintiff shows that the building which afterwards was used as the animal shelter by the Society, was in a very bad state of repair at the time the Society took over. The Society made extensive repairs and improvements at its own expense, with the tacit consent and permission of the City. During the eight years of

occupancy by the Society, the Society maintained the building, built animal pens, and provided at its own expense or principally so, the caretaker's house. Originally there were some twenty or more buildings on the tract that was leased to the Government, but vandals had broken the windows, carried away parts of the buildings, and either at the time the Society moved in, or during its occupancy, all of the other buildings had been torn down or had been carried away. The caretaker's house was moved to the foundation of one of the old buildings. The animal shelter building was sectional in that it could be taken apart and moved, and was bolted to the foundation. The caretaker's house was a frame building that was moved by the Society to the slab foundation of one of the old buildings and was placed on blocks. Afterwards a bath room was built on to this caretaker's house by the Society, but the evidence showed that the City assisted in this part of the work.

The defendant contends that the buildings, the furnace placed in the animal shelter, the pens and other fixtures were realty. The plaintiff contends these were personalty.

Defendant contends that the evidence fails to show such a right of property or possession to entitle the plaintiff to bring an action in trover, and to support the theory of unlawful conversion by the defendant. In support of this contention it cites the cases of Nettleton v. Kerr, 167 Ill. App. 74; Ridge v. Giffrow, 220 Ill. App. 590; Manufacturers Mercantile Co. v. M. R. Co., 169 Ill. App. 560, and others. All of these cases

occupancy by the society, [illegible] the [illegible] library, built [illegible], [illegible] or [illegible] officially so, the [illegible] retainer's house. [illegible] there were some twenty or more [illegible] the [illegible] the government, [illegible] room [illegible], [illegible] away parts of the building, [illegible] moved in, or [illegible] the society, [illegible] had been torn [illegible] room [illegible]. The [illegible] house was moved to the [illegible] the entire [illegible] the entire [illegible] building was [illegible] these spirit [illegible] the [illegible] caretaker's house [illegible] looked [illegible] the [illegible] was placed on [illegible]. [illegible] this caretaker's house by the society, but the evidence shows that the [illegible] was used in this [illegible] the work.

The defendant contends that the building, the furniture located in the [illegible] museum, the [illegible] and [illegible] were really. The plaintiff contends these were [illegible].

Defendant contends that the evidence fails to show such a right of property or possession to maintain the [illegible] bring an action in trover, [illegible] to carry out the theory of unlawful conversion by the defendant. In support of his contention it cites the cases of Bebbington v. Levy, 167 Ill. App. 74; Howe v. Griffiths, 230 Ill. App. 490; Manufacturers Auto Tire Co. v. [illegible] R. Co., 189 Ill. App. 368, and others. All of these cases

lay down the rule that the plaintiff must prove title or special property in the property alleged to have been converted, and that plaintiff must recover upon the strength of its own title. These cases require three things to be proved by the plaintiff in order to maintain an action of trover, namely, the plaintiff must prove title, it must prove its right to immediate possession thereof, and the wrongful withholding of the property by the defendant. This is unquestionably the law in Illinois. Applying the rule thus laid down, the question reverts to the proposition of ownership. There is no question that the plaintiff was in possession of the buildings, the fixtures and equipment. Possession of personal property is prima facie evidence of ownership. Brownell v. Dixon, 37 Ill. 197; Dunlap v. Savage, 196 Ill. App. 378. However, as stated in the case of Nettleton v. Kerr, heretofore cited, the plaintiff must recover upon the strength of his own title and not upon the weakness of the title of the defendant. In this case it is incumbent upon the plaintiff to not only show title and right of possession, but also that the property converted was personal property. The trend of our later decisions has been for some time to hold that fixtures are personalty. Thuma v. Granada Hotel Corp., 269 Ill. App. 484; Hopwood v. Green, 310 Ill. App. 411. This would tend to make the furnace and the animal pens personalty and not such property that would attach to the land. Where there is an intention that buildings or other property

lay down the rule that the plaintiff can have title or special property in the property alleged to have been converted, and that plaintiff must recover upon the strength of its own title. Some cases require these things to be proved by the plaintiff in order to maintain action on trover, namely, the plaintiff must have title, it must prove the right to a definite possession thereof, and the wrongful withholding or [illegible] by the defendant. [illegible] applying the rule [illegible], the courts [illegible] proposition or [illegible]. [illegible] the plaintiff was in possession of the [illegible], [illegible] equipment [illegible]. Possession of personal property is prima facie evidence of ownership. [illegible], 27 Ill. App. 107; [illegible] v. [illegible], 130 Ill. App. 327. However, in stating the case of [illegible], [illegible], the court [illegible] recover [illegible] weakness of the title [illegible]. [illegible] it is incumbent upon the plaintiff to not only show title or right of possession, but also that the property converted is personal property. The trend of our later decisions has been for many time to hold that fixtures are personality. [illegible] v. [illegible] Hotel Corp., 260 Ill. App. 408; [illegible], 241 Ill. App. 411. This would tend to make the fixtures on the personal para personality and not such property that would attach to the land. Where there is an intention that build-ings or other property

shall continue as personal property and not become part of the real estate, it remains personalty. As said in the case of Sword v. Low, 122 Ill. 487, at page 497:- "There seems to be great unanimity in the authorities, that things personal in their nature may retain their character of personalty by the express agreement of the parties, although attached to the realty in such manner as that, without such agreement, they would lose that character, provided they are so attached that they may be removed without material injury to the article itself, or to the freehold."

In the instant case, when the building used as an animal shelter was built by the Government, the Government retained title and ownership to the building, and the building itself was so constructed as to be removable. Although repaired and in some measure replaced by the Society, the building remained a removable, sectional building. The animal pens built therein were removable. The caretaker's house, was moved to the site of one of the old buildings and placed on the concrete foundation of this old building. It was movable. Up to 1956, there does not seem to have been any claim on the part of the City as to ownership, or any desire to take possession of the buildings or fixtures, which the City now claims to own. By now claiming ownership, the question arises as to whether or not the City by the action of its officials, did in fact give the old building to the Society, and did the City, through its action or inaction, and acquiescence permit the Society to expend

large sums of money on these buildings and fixtures, and thus permit the Society to become the owner of the same. This is largely a question of fact as to the actions on the part of the two parties, and the jury by its verdict answered in the affirmative. But the legal question still is present, as to whether or not such permitting and such acquiescence would constitute such action on the part of the City as to constitute the actual parting of title to the buildings and fixtures. The City contends that even if an agreement was made between the three commissioners of the City and officials of the Society, it was void because it was not expressly authorized. That municipal authorities cannot give away municipal property. We think, as a general proposition, this position is sound and that if the building had any value at the time of the alleged gift, it would have been void. But here, the building was a liability. It had no actual value, and was merely a shell of an old building, that would have been torn down or carried away by vandals. Actually the City gave nothing to the Society, but the right to use the property on which it was located and to build thereon, and by its actions for eight years, permitted the Society to expend large sums of money in building, repairing and improving the buildings in question, and in installing fixtures and equipment. Under the circumstance, we do not believe that the law cited as to the right of the city commissioners to give away property or the necessity of express authority is applicable. Rather the question becomes

large sums of money on these buildings [illegible] fixtures, in the permit the Society [illegible]. This is largely a question of fact for the [illegible] the two parties, and the jury by its verdict answered in the affirmative. [illegible] the legal question involved [illegible], is the whether or not such conditions [illegible] could constitute consideration on the part of the city [illegible] the action [illegible] the buildings and fixtures. The City contends that even if [illegible] the town commissioners [illegible] officials of the city, at the vote [illegible] expressly authorized. [illegible] municipal authorities [illegible] thus, as a general proposition, that [illegible] that if the building [illegible] the [illegible] gift, it would have been [illegible] here, the [illegible] liability. It has no [illegible] an old building, that would have been [illegible] away by [illegible]. [illegible] the city gave [illegible] the Society, but the right to use the property on which it was located and to build thereon, [illegible] its [illegible] for [illegible] years, or [illegible] the Society to expend large sums of money in [illegible], repairing and improving the buildings thereon, and in installing fixtures and equipment. Under the circumstances, we do not believe that the law cited as to the right of the city commissioners to give away property or the necessity of express authority is applicable. [illegible] the question becomes

one of whether or not, by its acquiescence and tacit approval, the City permitted the Society to use the real property for a site for its buildings, and whether or not, at this late date, the City can assert ownership to something it never claimed or had title to. It seems clear the buildings themselves remained removable and were movable at all times. While the evidence is not too clear as to the exact terms of the oral agreement in the beginning between the Society and the City officials, it does seem clear that the Society always intended to own the buildings thus rebuilt or repaired, or moved on the property and the fixtures installed therein, and that the City never claimed ownership or asserted ownership, until April 19, 1956, almost eight years after the Society moved on to the real estate and commenced operations. It would seem to this Court, from the circumstances attending, that it was the intention of the parties, or such intention may be presumed from the actions of the parties, that each party intended that the buildings and the fixtures installed by the Society should remain the property of the Society and not become the property of the City and that because of the removable character of the property and the fact that it could be removed without injury to the property itself or the real estate, it remained personal property. And as personal property, it was at all times the property of the Society, and while the City retained the right to compel the removal thereof at any time, the City at no time had any right of property in them.

one of whether or not, by its acquiescence and tacit approval, the City permitted the society to use its real property for a site for its buildings, and whether or not, at this late date, the City can assert ownership to something it never claimed or had title to. It seems that the buildings themselves remained removable and were removable at any time. While the evidence is not too clear as to the exact term of the original agreement in the beginning between the society and the City officials, it does seem clear that the agreement always intended that the buildings that erected or moved on the property and the fixtures installed therein, were not the City never claimed ownership or asserted a property, until April 16, 1960, almost eight years after the society moved on to the real estate and commenced operations. It would seem to this court, from the circumstances attending, that it was the intention of the parties, or such intention may be presumed from the actions of the parties, that such party intended that the buildings and the fixtures installed by the society should remain the property of the society and not become the property of the City and that because of the removable character of the property and the fact that it could be removed without injury to the property itself or the real estate, it remained personal property. And as personal property, it was at all times the property of the society, and while the City retained the right to compel the removal thereof at any time, the City at no time had any right of property in them.

The City contends that the agreement between the officials of the City and the representatives of the Society was void and unconstitutional, in violation of statutory law and ultra vires. In support of this position it cites Separate Section 2 of the Illinois Constitution of 1870. A reading of that separate section fails to disclose any relevancy to the present matter. That section does provide that no county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation, but that prohibition is not applicable to the facts of this case. The City also contends that Sections 1 and 2 of Chapter 59, Illinois Revised Statutes renders the agreement void. These two sections are part of the Chapter on Frauds and Perjuries, and set out the requirement that certain contracts must be in writing. There is no analogy or application to the facts in this case. And the City basing its contention on the theory that the City officials had no power to enter into the agreement with the Society, cite the case of DeKam v. City of Streator, 316 Ill. 123. In that case the city officials entered into a contract with an engineer to draw up plans for a sewer improvement, the contract specifically reciting that there was no authority to bind the city for the payment of the engineer's fees. The contract was held void because of the express prohibition in the law governing cities and villages, that no municipality could enter into a contract to

The City contends that the agreement between the officials of the City and the representatives of the society was void and unconstitutional, in violation of statutory law and ultra vires. In support of this position it cites separate section 1 of the Illinois Constitution of 1870. A reading of that separate section fails to disclose any relevancy to the present matter. That section does provide that no county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or loan credit to or loan its credit in aid of such corporation, but that prohibition is not applicable to the facts in this case. The City also contends that Sections 1 and 2 of Chapter 38, Illinois Revised Statutes renders the agreement void. These two sections are part of the chapter on Liquor Licenses, and set out the requirement that certain contracts must be in writing. There is no analogy or application to the facts in this case. And the City basing its contention on the theory that the City officials had no power to enter into the agreement with the Society, cite the case of Dalman v. City of Streator, 316 Ill. 123. In that case the city officials entered into a contract with an engineer to draw up plans for a sewer improvement, the contract specifically recitting that there was no authority to bind the city for the payment of the engineer's fees. The contract was held void because of the express prohibition in the law governing cities and villages, that no municipality could enter into a contract to

expend any money of the city without first making an appropriation therefor. The case is not applicable here, since the City of Springfield made no contract to expend any money, did not in fact expend any money, except that incidental to its function of maintaining a dog pound, and by its agreement with the Society, did not give away, or lease or expend anything of value.

A further contention by the defendant is that the verdict is against the manifest weight of the evidence. As this court has stated so many times that a citation of the authorities is unnecessary, unless the verdict is against the manifest weight of the evidence or palpably erroneous, this court as a reviewing court will not disturb the verdict. Reviewing the evidence we cannot say that the verdict is against the manifest weight of the evidence, or that it is palpably erroneous. This is also true as to the contention that the trial court admitted improper testimony, admitted improper exhibits and refused to give two instructions submitted for the defendant. If error occurred in the trial by the admission of certain testimony, or exhibits, or the refusal to give the two instructions complained of, such error was not such as to justify a reversal. The trial courts instructions given for the defendant seem to be ample and adequate to cover the law governing the case. We fail to see how the admission of the testimony regarding the

expend any money of its own without first a [illegible] instruction director. The case is not applicable here, as the city of Springfield made no contract to expend any money, but in fact expends any money, except that incidental to the function of maintaining a [illegible] park, and by its agreement with the society, did not give away, or waive or expend any money or value.

Further contention by the defendant is that [illegible] is against the manifest weight of the evidence. [illegible] has stated so many times that [illegible] of the evidence is unnecessary, unless the verdict is against the manifest weight of the evidence or plainly erroneous, this court is a reviewing court and will not undertake the task. Reviewing the evidence we cannot say that the verdict is against the manifest weight of the evidence, or that it is a plain error. This is also true as to the contention that the trial court [illegible] improper testimony, sustained improper objections and refused to give the instructions requested for the defendant. If error occurred in the trial by the admission of certain testimony, or exhibits, or the refusal to give the instructions requested, such error was not such as to justify a new trial. The trial courts instructions given for the defendant seem to be ample and adequate to cover the law governing the case. We fail to see how the conclusion of the testimony regarding the

suit in the Justice's court and the admission of the checks showing payments by the Society, would affect the jury's verdict in this case, to the degree that such admission would justify reversal.

The judgment will be affirmed.

Affirmed.

Carroll, P. J. and Roeth, J. concur.

suit in the Judge's court was true, judgment in the amount allowing payments by the society, would affect the jury's verdict in this case, to the degree that such judgment would ultimately reversed.

The judgment will be affirmed.

Affirmed.

Carroll, P. J. and Booth, J. concur.

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Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A. D. 1958

17 I.A.2d 553

General No. 10158

Agenda No. 2

People of the State of Illinois, Plaintiff-Defendant in Error, vs. Ray Edmundson, Defendant-Plaintiff in Error.	Error to County Court of Shelby County

PER CURIAM

The defendant was charged with driving a motor vehicle while under the influence of intoxicating liquor in an information filed in the County Court of Shelby County. Upon trial by jury, he was found guilty and after his motion for a new trial was denied, the court sentenced him to pay a fine of $150.00. He prosecutes this writ of error to review the judgment.

Errors urged as requiring reversal are that the evidence is not sufficient to establish guilt beyond a reasonable doubt; that the jury was not properly instructed; and that the argument of the state's attorney was improper and prejudiced the jury against the defendant.

Abstract

STATE OF INDIANA
APPELLATE COURT
SITTING AT ELKHART

May Term, A. D. 1917

General No. 10113

People of the State of Illinois,

Plaintiff-Defendant in error,

vs.

Fay Adamson,

Defendant-Plaintiff in error.

Appeal from Elkhart Circuit Court
of Indiana County

PER CURIAM

The defendant was charged with grand larceny while under the influence of intoxicating liquors in an information filed in the County Court of Elkhart County. Upon trial by jury, he was found guilty and after his motion for a new trial was denied, the court sentenced him to the penitentiary for 1 year. He prosecutes this writ of error to reclaim his judgment.

Errors urged as mentioning overruled are that the evidence is not sufficient to establish guilt beyond a reasonable doubt; that the jury was not properly instructed; and that the argument of the state's attorney was improper and prejudiced the jury against the defendant.

There is little or no dispute as to the series of events leading up to defendant's arrest. He had spent the afternoon and evening of May 7, 1957 in attendance at a business meeting in Effingham, Illinois. He left Effingham in his automobile around 11 o'clock P.M. and at about 1 o'clock A.M. the next morning, when 3 or 4 miles east of Shelbyville he ran out of gas. He hitchhiked a ride to Shelbyville where he went to Hiney's Restaurant to inquire about getting some gasoline. Lower, the nightman at the restaurant, called Charles W. Burnett, night policeman and deputy sheriff, who procured a gallon of gas for defendant. Burnett, accompanied by defendant and a Mr. Hamm took the keys to defendant's car. When he was asked by Burnett as to whether he had been drinking, defendant answered yes. Burnett asked defendant to check in at the hotel in Shelbyville. Hamm drove defendant's car to the hotel. Defendant registered and went to a room in the hotel at approximately 3 A.M. He remained there about 45 minutes and then left in his car, driving west on Route 16. He again ran out of gas near Foor's Salvage Yard. He purchased some gas from Rudy Foor. Shortly after leaving the Foor place he was overtaken and arrested by Burnett.

The testimony on the issue as to defendant's intoxication is in conflict. Burnett, the arresting officer, testified he had a conversation with defendant when he first met him at Hiney's Restaurant; that defendant asked the witness if he could

get him some gas; that witness told defendant that the latter seemed to be under the influence and should not be driving; that witness asked defendant if he would stay out of his car and stay the rest of the night at the hotel, to which defendant agreed; that while en route to defendant's car, witness asked defendant where he had been and what he had been doing, to which defendant replied that he had been at a dinner meeting in Effingham and had a drink before dinner and "then had been drinking with the boys all evening after the dinner"; that witness again observed defendant just prior to arresting him as the latter drove his car away from the Ruby Moor place; that witness followed defendant's car on the highway for about a mile and that defendant "was all over the road, as much on the wrong side as on the right side". This witness further testified that at the time of the arrest he smelled liquor on defendant's breath; that his speech was broken and that he staggered and that in his opinion defendant was under the influence of intoxicating liquor.

Frank Lower, an employee of Hiney's Cafe, testified that he smelled liquor of some kind on defendant's breath and that defendant's eyes were "a little bit shiny".

Cecil C. Clausen, Sheriff of Shelby County, who was present when defendant was brought to the county jail by Burnett, testified that defendant, in answer to a question as to where he had been, said he had been to Effingham, had dinner and "drank all evening with the boys". Witness described defendant's eyes

as being bloodshot and glassy and stated that he smelled liquor on defendant's breath. This witness further testified that in his opinion defendant was under the influence of liquor.

The defendant testified in his own behalf and stated that he had 3 bourbon and ginger ale drinks in Effingham before 8:30 P.M. and that he had nothing more to drink during the remainder of the evening. He denied telling Officer Burnett that he had been drinking all evening with the boys; denied weaving his car on the highway; denied that Burnett told him to stay out of his car; and denied being under the influence of intoxicating liquor at any time while driving his car.

W. P. Mautz, Edwin G. Machin and F. E. McManigall, witnesses who saw defendant in Effingham several hours prior to his arrest, each gave an opinion that defendant , when they observed him, was not under the influence of intoxicating liquor. Rudy Foor testified that defendant drove on the right side of the road; that his car did not weave; and that he did not stagger and that he smelled no liquor on his breath.

It is apparent from the foregoing resume of the testimony concerning defendant's intoxication that the evidence on that subject is in sharp conflict. Two of the people's witnesses who observed defendant at the time of his arrest, testified that in their opinion defendant was then intoxicated. Three witnesses for the defendant testified that he was not intoxicated when they

last saw him in Effingham 4 or 5 hours prior to his arrest. The defendant testified he had consumed 3 bourbon whiskey and ginger ale drinks but that he was not intoxicated when he was arrested. The existence of such conflict in the evidence as to defendant's intoxication does not warrant the conclusion that the evidence is insufficient to support the verdict. Evaluation of the testimony of the several witnesses and the weight to be accorded the same is a function committed to the jury. The rule by which this court must be governed in reviewing a criminal case is stated in People v. Woodruff, 9 Ill. 2d, 429, where it is said:

> "The rule is well known that the credibility of witnesses and the weight of evidence are, in the first instance, questions best determined by the jurors who are in a position to see and hear the witnesses and to observe their demeanor while testifying. It is for them to accept the testimony they believe, reject what they do not believe, and return a verdict accordingly. People v. Wilson, 1 Ill. 2d 178, 187.
>
> "It is fundamental that this court will not disturb a verdict of guilty on the ground that the evidence is not sufficient to convict unless it is so palpably contrary to the verdict or so unreasonable, improbable or unsatisfactory as to justify the court in entertaining a reasonable doubt of the defendant's guilt. Nor will we substitute our judgment for that of a jury in merely weighing the credibility of witnesses where the testimony is conflicting. People v. Tensley, 3 Ill. 2d 615, 621."

We have examined the record in this case with the foregoing principles in mind, and are satisfied that it contains ample evidence to justify the conclusion reached by the jury.

People's Instruction 13 of which defendant complains, informed the jury in substance that it is not necessary that every fact or circumstance be proved beyond a reasonable doubt but that it is sufficient if all the material allegations of the information are so proven. Defendant's criticism of this instruction is that it fails to define the material allegations which the People were required to prove and that no definition thereof is found in any of the other instructions. The nature of the charge against defendant as contained in the information was explained in People's Instruction 2 and by People's Instruction 6 the jury were informed that the People were required to prove the said charge against the defendant beyond a reasonable doubt. Since the essential elements of the offense charged were defined in other instructions, the giving of the criticized instruction in this case was not error. People v. Skelly, 409 Ill. 613.

The trial court properly refused to give defendant's tendered Instruction 19 which is to the effect that failure of the People to produce witnesses to the charge or explain their absence creates a presumption that their testimony would have been adverse to the prosecution. The apparent basis for the tender of such instruction was the failure of the People to call as a witness one of the persons whose names appear on the information. Of the 5 persons listed thereon as witnesses, 3 were called to testify by the People and one by the defendant.

People's Ladies Home [illegible] a modern [illegible]

Informed the jury in substance [illegible]

every fact [illegible]

but that it is sufficient if [illegible]

information [illegible]

also is that it [illegible]

the people [illegible]

in fact [illegible]

[illegible]

conditions [illegible]

[illegible]

like [illegible]

[illegible]

in other [illegible]

in this [illegible]

[illegible]

tendered [illegible]

the people [illegible]

their absence [illegible]

have been [illegible]

the tenor [illegible]

call as a witness [illegible]

information. [illegible]

were called [illegible]

There is no showing in the record that the 5th witness was rendered unavailable to the defendant by the People. If as argued, there is reason to believe the witness in question would testify adversely to the prosecution, then the defense should have subpoenaed him to testify. There appears to be no basis for the conclusion that the defendant was prejudiced by the refusal of the trial court to give this particular instruction.

Defendant complains of prejudice to his rights by reason of improper argument by the state's attorney. The only reference to the alleged prejudicial remarks appearing inthe abstract is that contained in defendant's motion for a new trial and his affidavit filed in support thereof. An attempt is made in the motion and affidavit to recite certain excerpts from the state's attorney's argument. At best such recital is only defendant's version of what the state's attorney actually said. The remarks in question and the ruling of the court on an objection thereto should have been incorporated in the report of the proceedings and they cannot be furnished by affidavit. Since defendant has failed to properly preserve for review the question as to the propriety of the state's attorney's remarks, this court may not properly review such issue. People v. Ladas, 374 Ill. 419; People v. Ritcheson, 396 Ill. 146; People v. Allen, 413 Ill. 69.

Upon careful consideration of the record in this case, we are unable to say that the defendant did not receive a fair trial. Accordingly, the judgment of the County Court of Shelby County is affirmed.

Affirmed.

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47146

17 I.A. 2d 553

PRINTING DEVELOPMENTS, INC., a corporation, Plaintiff - Appellee, v. THOMAS HART FISHER and RUTH PAGE FISHER, his wife, Defendants - Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment entered in a Forcible Detainer Suit. The premises in controversy consist of approximately 350 square feet enclosed as a storeroom in the basement storage in the Michigan Square Building, known as "B-3", and located at 540 North Michigan Avenue in the City of Chicago, Illinois.

Defendants occupied certain space on the tenth floor in the Michigan Square Building under written leases from 1930 until 1945. Thomas H. Fisher executed a written lease for the tenth floor for the month of November, 1953. Upon the termination of this lease, defendants vacated the premises on the tenth floor. Defendants also used the storeroom space known as "B-3" in the basement. In October, 1953, when Thomas H. Fisher executed the lease for one month for the tenth floor, he asked plaintiff for a little more time to remove property of defendants in the storeroom. This storeroom at all times was fully enclosed and kept under lock and key. Defendants had a key to B-3, and it was accessible to them at all times.

Commencing in February, 1954, and in 1955, until March 20, 1956, oral requests were repeatedly made by plaintiff to defendants to remove property from B-3. March 20, 1956, plaintiff served written notice on defendant, Thomas H. Fisher, which read as follows:

"Dear Sir:

"It has been considerably more than a year since I called you with respect to certain valuable basement space in the above building, which is being used for storage of some personal property belonging to you. At that time you told me that you were making arrangements which would be completed in a few months to remove your said property. Since that time I have made a number of telephone calls to your office but received no response to my messages.

Since this basement space is needed for building purposes, we cannot permit this situation to continue. We must, therefore, ask that you make immediate arrangements to remove your property without delay. If there is any reason why this is not possible, please so advise us and we may be able to be of some assistance.

Very truly yours,

Arthur Rubloff & Co.
S. L. Edelstein"

Fisher failed to remove the property, and on June 27, 1956, Forcible Detainer proceedings were instituted for possession of the premises B-3.

The record shows that Ruth P. Fisher, wife of Thomas H. Fisher, was never served with summons, entered no appearance, and filed no answer. But, four days after the judgment was entered, she joined in the appeal of Thomas H. Fisher.

The question presented is whether the judgment for possession in the Forcible Detainer Suit is void as against defendant, Ruth Page Fisher, for lack of service of process.

This question can be raised only by filing a special appearance in the trial court. Being a dilatory motion, it does not reach the merits of the case, and failure to confine an appearance to a denial of jurisdiction, will change the appearance to a general one. Kelly v. Brown, 310 Ill. 319. To avail herself of the right to question the jurisdiction of the court, defendant, Ruth Page Fisher, should either have not appeared at all or limited her appearance to an objection against the jurisdiction of the court. Craven v. Craven, 407 Ill. 252. Moreover, Ruth P. Fisher could have moved the court to vacate the judgment entered against her in the trial court during the thirty day term in accordance with Illinois Revised Statutes, Chapter 110, par. 50(6) and Municipal Court Rule 1, Section 50(6). By joining in the appeal in this court, she submitted to the jurisdiction of the court, and the attempt to raise the question of service of process comes too late.

Defendants further contend that plaintiff's suit for possession of the space known as "B-3" should fail because plaintiff had leased these premises to Time, Incorporated.

The only evidence in the record bearing on this point is where Thomas H. Fisher cross-examined plaintiff's witness, Walter C. Finn, who managed the building for Arthur Rubloff & Co.. The questions propounded by Thomas H. Fisher and the answers given by Mr. Finn read:

> "Q. Now, you used the word, 'Time', T-i-m-e, in one of your answers. You meant Time, Incorporated, the publisher of Time magazine, Fortune magazine and Life magazine, did you?
>
> "A. I meant Time, Incorporated, that is correct, as

embodies the tenants of the Michigan Square Building. They have a tenancy at the Michigan Square Building.

"Q. Now I am lost. What tenancy have they got there?

"A. They rent from Printing Developments, Inc., Mr. Fisher.

"Q. What space do they lease in the building?

"A. Well, they go from partial occupancy on the second floor completely through the building to and including the basement that we are speaking of now.

"Q. The B-23, B-3 areas?

"A. In that general area, yes, Mr. Fisher.

"Mr. Brown: Not B-3.

"The Witness: I said in that general area."

The record further shows that partitions were removed from B-23, as well as other storage spaces B-25, B-26 and B-27. This space, which was formerly enclosed, is now all open. None of this area includes the space known as "B-3". Nor does it appear that the space known as "B-3" was leased to Time, Inc. Moreover, the defense that there was outstanding a lease of the same premises to Time, Inc., was not raised in the trial court. In our view, the contention is without merit. This is a suit for wrongful detention and title cannot be inquired into. The right to immediate possession is all that is involved or can be determined. It appears to us that defendants argue that plaintiff is obligated to trace its title from the original patent deed. This is not necessary in a possessory action.

The undisputed evidence shows that the title to the building at 540 N. Michigan Avenue was conveyed February 28, 1945 by special warranty deed issued by the Northwestern Mutual Life

Insurance Company to the Michigan Square Building Corporation; that the Michigan Square Building Corporation merged with the plaintiff; and that under the articles of merger, all title to the real estate in question became the property of plaintiff. Seymour Edelstein, Secretary and Treasurer of Arthur Rubloff & Company, agents, testified that at the time plaintiff became owner of the premises by virtue of the merger, that same company continued as manager of the premises, and that on December 31, 1952, the Michigan Square Building Corporation assigned the management contract dated May 23, 1951 to plaintiff. Walter C. Finn, manager of the building at 540 N. Michigan Avenue, testified that all "leases went across his desk" during the six years of his administration; that no lease was made for storage in B-3 with either defendant in this period; and that neither of them has produced receipts to show that any rent was paid after October 14, 1953.

Defendants insist that where a holdover tenant occupies the premises involved and pays rent for a period of seven or eight years, plaintiff is required to give proper notice to the tenant.

The lease for the tenth floor space made no mention of the B-3 area. Proof is lacking that any rent was paid for the basement storage space during the 7 or 8 years immediately prior to 1953, or that defendants were holdover tenants. In any event, these questions of fact were determined adversely to defendants by the trial court. We perceive nothing indicating the relationship of landlord and tenant. The court could find that

defendants were mere licensees, and plaintiff had only to give notice that the license was revoked. (Dunstedter v. Dunstedter, 77 Ill. 580 and B. J. Bielzloff Products Company v. James B. Beam Distilling Company, 3 Ill. App. 2d 530.)

Finally defendants contend that the premises in question are not sufficiently described in the pleadings. It is our view that the premises referred to by all parties as, the basement storage space, B-3, at 540 N. Michigan Ave. in Chicago, Illinois, are sufficiently described. (Chicago Ry. Equipment Co. v. Wilson, 250 Ill. App. 231 and Mills v. Reiger, 328 Ill. App. 230.) There is no evidence in the record that there was any doubt or confusion regarding the exact space plaintiff sought to recover. On the contrary, it is uncontroverted that the premises involved were enclosed; that they contained a door with a cabinet lock; that defendants held a key; and that defendants admit in their answer that they hold possession of the premises in controversy.

We have considered the other points argued, and the authorities cited in support thereof, but in the view we take of this case, it is unnecessary to discuss them. Therefore, for these reasons, the judgment below is affirmed.

AFFIRMED.

KILEY, P.J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

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47189

17 I.A. 2d 554

FREDERICK REX,

Appellant,

v.

THE RETIREMENT BOARD OF THE MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO, CLAYTON J. CUSACK, President, JAMES H. DILLARD, Vice-President, DAVID L. HARTIGAN, Treasurer, CHRIS W. KEANE, Recording Secretary, JOHN J. McDONOUGH, Trustee, and E. W. WETZEL, Executive Secretary,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Frederick Rex, plaintiff, was a civil service employee for 56 years and retired December 31, 1954, at the age of 74 years. He had been a continuous contributing member of the Municipal Employees' Annuity and Benefit Fund of Chicago since its establishment in 1911. Upon his separation from service, the Retirement Board of the Municipal Employees' Annuity and Benefit Fund of Chicago awarded him an annuity of $3,168, or $264 per month. Plaintiff rejected this award as being insufficient and filed a petition for a writ of certiorari. After a number of amendments were made to the petition, defendants answered. The trial court, after a hearing on the petition, as amended, and the answer thereto, dismissed the petition. Plaintiff appeals.

Annuities for employees having more than 20 years of service are based on Section 57-1/4 of the Act governing the Municipal Employees' Annuity and Benefit Fund (Ill. Rev. Stat.,

1953, Ch. 24, §1100-1/4), which provides for what is known as a "Minimum Annuity" for employees with long terms of service. The pertinent parts of Section 57-1/4 are as follows:

> "Notwithstanding the provisions of any foregoing section or sections of this Act concerning the amount of annuity which any municipal employee shall have a right to receive, any municipal employee who shall resign or be discharged from the service after he has attained an age of sixty-five (65) or more years, and who shall have completed twenty(20)or more years of service (as service is defined or computed in this Act), and for whom the amount of annuity or annuities provided in accordance with the foregoing provisions of this Act shall be less than the amount stated in this section, shall from and after the date of such resignation or discharge, in lieu of all annuity or annuities otherwise provided, be entitled to receive an annuity for life, of one hundred and fifty dollars ($150.00), plus an amount equal to one and one-half (1-1/2) per cent for each year of his service, to and including twenty (20) years, and one and two-third (1-2/3) per cent for each year of his service over twenty (20) years, of the average annual salary for the last five (5) years of his service, such annuity to be paid in equal monthly installments; * * * provided, further, that the annuity to be paid in accord with the provisions of this Section shall not exceed an amount in excess of sixty (60) per cent of such average annual salary, and, provided, further, that fifteen hundred dollars ($1500.00) shall be considered as the minimum amount of annual salary for any year, and six thousand dollars ($6,000.00) the maximum, excepting that for any year prior to the year 1953, such maximum to be considered shall be forty-eight hundred dollars ($4,800.00)."

Using these provisions as a basis for computation of plaintiff's annuity, the Retirement Board averaged the salary maximums applicable for the last 5 years of his service, i.e., 1950, 1951 and 1952 at $4,800 a year, and 1953 and 1954 at $6,000 a year, totalling for the 5 years a sum of $26,400 or an average yearly salary of $5,280, and awarded to plaintiff an annuity of $3,168, being 60% of the average yearly salary of $5,280, which was the statutory maximum.

Plaintiff's average yearly salary for the last 5 years of his service was $7,069.20, and he contends that the Board should have awarded him 60% of that figure and not applied to him the restrictive statutory maximums of $4,800 per year prior to 1953 and $6,000 per year for 1953 and 1954.

The question to be determined is whether the Retirement Board correctly interpreted the statute in fixing plaintiff's annuity award.

The 1945 Illinois Revised Statutes, Chapter 24, Section 1100-1/2 (§57-1/2 of the Act), contained the provision that for the annuity purposes of the Act, the annual salary of any participant shall not be an amount in excess of $3,000. In 1947 Section 57-1/4 (Ill. Rev. Stat., Ch. 24, §1100-1/4) was added, and Section 57-1/2 was amended, leaving out any reference to the amount of any salary to be considered for annuity purposes. The new Section 57-1/4 was a new minimum annuity section and the section under which plaintiff's annuity was awarded, but it contained no maximum annual salary to be considered in computing the 60% of the average annual salary for the last 5 years of service. In 1951 Section 57-1/4 was amended by establishing a $4,800 maximum annual salary to be used in computing the 60% of the average annual salary for the last 5 years of service. In 1953 Section 57-1/4 was again amended to make the maximum $6,000 for 1953 and thereafter, and stating "excepting that for any year prior to the year 1953, such maximum to be considered shall be forty-eight hundred dollars ($4,800.00)."

In 1947, when the Act was first passed, plaintiff was

over 65 years of age, and he contends that his pension rights were contractual and could not be affected by the 1951 maximum salary restriction. He fails, however, to cite ascertainable authorities in support of this contention. The record contains no information as to the amount of plaintiff's annual salary in 1947, and there is nothing before this court to show that in 1951 he had a previous 5-year average yearly salary in excess of $5,280, which was the average annual salary arrived at by the Board in determining his annuity.

The Supreme Court of this state has determined that statutory pensions, retirement allowances or benefits for employees, requiring compulsory participation, confer no vested rights upon the participants and are not in the nature of contracts between the participants and the State and, as not contractual, do not preclude necessary changes and amendments of the Act commensurate with changing economic conditions. Keegan v. Board of Trustees, 412 Ill. 430, 434-36 (1952); 8 I.L.P., Ch. 6, §312.

An examination of the provisions of Section 57-1/4, hereinbefore set forth in detail, shows the method and figures used by the Retirement Board in computing plaintiff's pension to be correct. He was given the statutory maximum annuity possible for the last 5 years of his service.

Plaintiff claims a refund of the salary deductions made after he reached the age of 65 years, which he says are "contrary to the law." Defendants deny this. In 1947, Section 1060 of Chapter 24 was amended to read:

"To provide Age and Service Annuities for present employees, contributions to the Annuity and Benefit Fund herein provided for shall be made by each present employee * * * as follows:

> (a) From and after the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, three and one-fourth (3-1/4) per cent and beginning July 1, 1947, five (5) per cent of each payment of the salary of each present employee shall be deducted and contributed to the Annuity and Benefit Fund herein provided for. Such deductions shall be made at the time such payments of salary are payable and shall be continued while such present employee shall be in the service." (Italics ours.)

Plaintiff has alleged no facts to show he came within the statutory provisions in force prior to July 1, 1947, which provided the formula for salary deductions to terminate. Defendants state that on July 1, 1947, plaintiff's salary deductions had not accumulated sufficiently to terminate his salary deductions, even though he had reached his 65th year prior thereto. After July 1, 1947, it made no difference what plaintiff's accumulation was, as the Act then governing the Fund required deductions to continue while plaintiff was in service. Plaintiff's refund claim is not meritorious.

Pension acts should be liberally construed to effect the object to be accomplished, but if the legislative intention is plain from the language used, the courts are not permitted to give the act a meaning not expressed in it. People ex rel. Campbell v. Swedeberg, 351 Ill. App. 121, 126.

Plaintiff's contention that the provisions of the Act in question are unconstitutional was abandoned on oral argument.

We conclude the annuity awarded to plaintiff is correct, and the judgment of the trial court should be affirmed.

AFFIRMED.

KILEY, P.J. AND LEWE, J., CONCUR.

ABSTRACT ONLY.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A.D. 1958

General No. 10151

Agenda No. 7

17 I.A. 555

Eunice Yantis,

Plaintiff,

vs.

Eldon Yantis,

Defendant.

Appeal from the Circuit Court of Champaign County

# # #

Eunice Ruth Taylor, formerly Eunice Ruth Yantis,

Plaintiff-Appellant,

vs.

Eldon Edgar Yantis,

Defendant-Appellee.

Roeth, J.

An appeal was taken from an order entered July 24, 1957, in the Circuit Court of Champaign County, denying the petition of plaintiff (the mother) for the custody of the two minor children of the parties which had previously been awarded to the father (defendant) by a decree of divorce entered March 21, 1957.

It appears from the record that the custody of the children, now six and seven years old, was awarded by the decree to their father who was then and who now resides in Kirksville, Missouri. On

June 1, 1957, by agreement between the parties, the children were sent to Illinois to their mother who was to keep them until about July 1, 1957, when their father would take them back to Missouri. On July 3, plaintiff filed her petition for modification of the custody provisions of the decree. A hearing was had on the motion and on the day following the hearing the court dismissed the petition for want of equity.

The defendant was living in Missouri at the time of the divorce and entered his appearance which substantially reads as follows:

> "Now comes Eldon Yantis, defendant... and waives all manner of summons and process in this cause and hereby enters his appearance in writing as fully as if he had been served with summons in said cause in the state of Illinois... and he further confers full jurisdiction upon said court over his person and the subject matter of this suit and consents that an immediate default will be taken and entered against him upon the filing of this appearance or at any time thereafter."

The decree subsequently entered was submitted by plaintiff and on the margin of page 1 appeared the following notation:

> "Approved as to form. Russell D. Roberts, Attorney for Eldon Yantis",

indicating an agreement between the parties as to the terms of the decree. That decree, after the usual recitation of facts, acknowledged the existence of the children but was silent as to their whereabouts and granted plaintiff a divorce, barred alimony and awarded custody of the minor children to the defendant in the following words:

> "It is further ordered, adjudged and decreed that the defendant, Eldon Yantis, be awarded the care, custody and control of the minor

June 1, 1 57, [illegible] the [illegible] was [illegible]

sent by fifty [illegible]

July [illegible], 195[illegible], and [illegible]

On [illegible], 1[illegible] filed [illegible]

custody [illegible] of the [illegible] .

and on the [illegible]

for want of equity.

The defendant [illegible]

and entered [illegible]

> [illegible] ... [illegible]
> ... [illegible]
> [illegible]

The decree [illegible]

at the [illegible]

> [illegible]

indicating an agreement between [illegible] the

decree. That decree, after the usual [illegible], acknowledged

the existence of the children but [illegible] their [illegible]

and granted plaintiff a divorce. [illegible] and awarded custody

of the minor children to the defendant in the following words:

> "It is further ordered, adjudged and decreed
> that the defendant, [illegible], be awarded
> the care, custody, and control of the minor

> children of the parties, namely, Marilyn Marie Yantis and Lorraine Louise Yantis, subject to the right of reasonable visitation on the part of the plaintiff."

Testimony by the plaintiff at the hearing on her petition to modify acknowledged that the terms of the decree as to custody were by agreement.

Plaintiff's petition to modify sets out her remarriage and the defendant's remarriage as grounds for modifying the decree and prays that she be awarded custody of the children and that the defendant be compelled to pay for their support. No other relief was asked by plaintiff.

It appears from the facts that the plaintiff and defendant separated on the 27th of August, 1954, and she kept the children with her until September, 1955. The custody of the children was then given to the husband, who kept them in Kirksville, Missouri. On the 1st of June, 1957, after the divorce, by agreement the children were given to the plaintiff with the understanding that the defendant would take the children back sometime around the first of July. Plaintiff married Lt. Harold J. Taylor stationed at Chanute Field and on June 1st was living in a small apartment in Champaign. Subsequently she and her husband moved to quarters on the base and took the children with them. The evidence discloses that in July of 1957 the defendant came to Illinois and attempted to get the children but was refused their custody and all efforts on his part to obtain them without court action were frustrated. Plaintiff

then filed this petition to modify the decree.

Plaintiff contends that the court erred in permitting the defendant to take the children out of the state over the mother's protest without requiring the defendant to post bond or otherwise assure their return or plaintiff's visitation. The record does not substantiate plaintiff's statement. The decree of divorce awards defendant the care, custody and control of the children without restriction or limitation except that it grants to plaintiff the right of reasonable visitation. At the time it was entered defendant was a resident of Kirksville, Missouri, and had custody of the children for approximately a year and a half prior to the entry of the decree. It appears that the decree was prepared in accordance with an agreement of the parties and inasmuch as it was submitted to the court by her we fail to see how she can now protest the lack of bond. It does not appear anywhere in the record that the court, at the time of the entry of the decree, was aware of the fact that the children were not in the state and it is manifest that the decree need not have provided for the custody of the children.

Plaintiff relies on Wolfrum v. Wolfrum, 5 Ill. App. 2d 471, 126 N.E. 2d 34; Martinec v. Sharapata, 328 Ill. App. 339, 66 N.E. 2d 103. Neither case, however, is controlling. In the former the appeal was from the final decree granting a divorce to the defendant and awarding custody of the child to him, with the right to take the children from the jurisdiction pending his discharge from the service and directing that he return the children to this state

then filed this petition to restore custody.

Plaintiff [illegible] defendant to [illegible] custody [illegible] protect without requiring the [illegible] assure their return or [illegible]. [illegible] subsequently the plaintiff [illegible] defendant was [illegible] restraining [illegible] right of [illegible] was a resident of [illegible] children for [illegible] the decree. [illegible] with an agreement of [illegible] to the court, [illegible] of fact. It [illegible] at the time of the entry of the decree, [illegible] the ability [illegible] decree had not been [illegible] the children.

Plaintiff relies on Oldham v. Oldham [illegible] 126 [illegible] 24 34; Arbiter v. Arbiter, [illegible] 103. Neither case, however, is controlling. In the former the appeal was from the final decree granting a divorce to the defendant and awarding custody of the child to him, with the right to have the children from the jurisdiction pending his discharge from the service and directing that he return the children to this state

upon his discharge. The court affirmed the decree but remanded with directions that defendant place a bond assuring his return to the jurisdiction. In the latter case the appeal was from an order modifying a decree which said order granted plaintiff the right to take the children from the jurisdiction of the court. The original decree awarded custody to plaintiff but required that she shall reside with the said minor child in Cook County, Illinois. The court reversed the modifying order holding that since the child had a good home within the jurisdiction of the court and was being well taken care of that the child should be kept within the jurisdiction and reach of the process of the court in order that its mandate might be immediately effective. In the case at bar, the original decree awarded custody without restriction and the award without requiring bond was made by agreement of the parties. That decree was res judicata on the question of the bond. Maupin v. Maupin, 339 Ill. App. 484, 90 N.E. 2d 234; Thomas v. Thomas, 233 Ill. App. 488; Wade v. Wade, 345 Ill. App. 170, 102 N.E. 2d 356.

Plaintiff's motion asks merely for modification of the custody provisions of the decree and the issues raised at the trial sought modification of the decree only to that extent. The lower court refused to modify the decree and by so doing could not, at least on this record, have altered the decree to provide for the bond plaintiff seeks. The record is completely silent as to any such demand made by plaintiff in the lower court. It is well established that plaintiff cannot raise on appeal an objection not raised in

the trial court. Thomas v. Smith, 11/App. 2d 310, page 319, 137 N.E.2d 117; Hartsock v. Kaskaskia Livestock Insurance Company, 223 Ill. App. 433.

Plaintiff contends the hearing on her petition was the first judicial determination as to which of the parents were to have the children; that the best interests of the children or the relative fitness of the parties had not previously been determined, and therefore she was not required to show a change in circumstances since the decree. Her position is that at the time of the entry of the decree the children were out of the state and the court had jurisdiction only over the marital res and lacked jurisdiction over the children. Under the facts in the case at bar we do not believe plaintiff's contention has merit. In Crossett v. Wittmore, 206 Ill. App. 320, (reported in abstract only) the court held that while a court will not ordinarily permit a child of divorced parents to be removed from the state, still, where the child is with the knowledge of the court residing in another state with the mother at the time a decree pending for the possession of the child by the mother based upon an agreement of the parties is rendered, such decree will not be disturbed where no other good reason exists for such change. Plaintiff had long before the decree surrendered the physical custody of the children to the defendant in Missouri and while the court cannot inquire into the circumstances surrounding the agreement, neither can the plaintiff who obtained the decree and agreed to the custody provisions, now complain that the children

[illegible]

the trial court. [illegible] 117; [illegible] 133.

[illegible]

[illegible] judicial recognition [illegible] children; [illegible] [illegible] of the [illegible] separation [illegible] either the children. [illegible] [illegible] 206 Ill. [illegible] that while [illegible] permits to be removed from [illegible] with the proximate [illegible] mother or the [illegible] by the mother [illegible] such decree will not be [illegible] for such error. [illegible] the physical custody of the children to the [illegible] and while the court cannot impair into the agreement, neither can the plaintiff who obtained the decree and agreed to the custody provisions, now complain that the children

were not physically present in Illinois at the time the decree was entered. The lower court was never asked to adjudicate the question of the custody of the children, nor was the matter of the deprivation of joint care and control of their parents presented to the court prior to the entry of the decree. This question was disposed of by the parties by consent and while it is true that a court will not ordinarily permit the child of divorced parents to be removed from the state, yet where such removal is accomplished not against the will of either of the parents but with their encouragement and consent this court will not disturb such a decree where no other reason exists for making such change.

Plaintiff contends that she need only show that she is a fit person and that as a matter of law the court erred in refusing to modify because of her failure to prove the defendant's home unfit. She states the burden was on the defendant to show that plaintiff or her home was unfit.

The case at bar cannot be distinguished from Maupin v. Maupin, supra. In that case a decree of divorce was entered for the wife by default and custody given to the husband. In neither case did the lower court hear testimony as to the fitness of the parents to have custody of the children at the time the decree of divorce was granted. No substantial difference between the two cases is discernible. In the Maupin case the plaintiff contended:

> "... that it was not necessary for her to show that there was anything wrong with the care of the children in appellant's home, or that his home was unsuitable, or that he was a

[illegible]

> "... that it was not [illegible] to show that there was anything wrong with the case of the children in appellant's room, or that his home was unsuitable, or that he was a

> person of bad character and unfit to have the children... all that was necessary for her to show was, that her own conditions had changed, and that she could now provide a home for the children which she could not have done at the time of the original divorce hearing. In our opinion this is not the law..."

Facts similar to those in the Maupin case and the case at bar appear in Thomas v. Thomas, supra, and Linn v. Linn, 329 Ill. App. 652, 70 N.E. 2d 92, the latter a case heard in the Third District. In all three cases the court commented on the fact that the record failed to indicate that the appellant is an improper person to have custody of the children or that the appellant's home was not suitable. In each case the court pointed out that the only change brought out in the evidence was that "appellee's condition had changed" and further there had been no showing that it was for the best interests of the children that their custody be transferred. The same thing that was said in the Maupin case can be said on the facts before this court now. The court said:

> "The case now before us, and the cases above cited, must be distinguished from ~~the~~ cases in which the divorce decree awards custody upon a specific finding pertaining to temporary conditions affecting the party deprived of custody. We have no doubt that a chancellor may incorporate in a divorce decree a provision that custody is temporarily placed with one party, because the other party does not at that time have a suitable home, but is a fit parent, and entitled to have custody when, and if, that party acquires a suitable home. There is nothing in the divorce decree before us to that effect. It is a flat award of custody to appellant..."

The decree of divorce in this case is a flat award of custody granting only reasonable rights of visitation to the plaintiff.

[illegible]

[illegible]

appear in [illegible]

[illegible]

In all where [illegible]

failed to [illegible]

custody of the [illegible]

In such [illegible]

out in the [illegible]

further [illegible]

of the [illegible]

that was [illegible]

this court [illegible]

> "The case was before us, and [illegible] must be distinguished from [illegible] cases in which the divorce decree awards a [illegible] custody finding relative to temporary permission otherwise the same. Decreed [illegible] a chancellor may incorporate [illegible] provision with custody in one [illegible] party, because the other party does not at that time have a suitable home, but is [illegible], and [illegible] to have custody when, and if, the party acquires a suitable home. There is nothing in the [illegible] before us to that effect. It is a fact sought of course to appellant..."

The decree of divorce in this case is a first award of custody granting only reasonable rights of visitation to the plaintiff.

It has long been the law of this state that the person seeking modification of the custody provisions of a decree has the burden of proving a material change in circumstances affecting the welfare of the children. Maupin v. Maupin, supra. This is precisely what she sought to do and consequently assumed the burden of proving the change. Her contention is therefore without merit.

Plaintiff finally contends that there has been a material change in circumstances and the lower court improperly exercised its discretion in failing to modify the decree. While it is true, as plaintiff states, that the improper exercise of discretion is grounds for reversal, Horn v. Horn, 5 Ill. App. 2d 346, 125 N.E. 2d 539, it is manifest that this court will not disturb the trial court's findings unless clearly and palpably erroneous. She contends that the bilateral remarriage of the parties and the change in her financial condition is such material change as to warrant modification. The bilateral remarriage alone is not sufficient grounds for reversal. The evidence fails to disclose that defendant's new wife in any way detracts from defendant's fitness to have custody of the children. As to plaintiff's remarriage, the testimony establishes that it has improved her situation, making it more adaptable for the raising of children. It must be remembered, however, that the children were surrendered to the defendant a full year and a half before the divorce and that plaintiff remarried two days after her divorce from the defendant was granted. Certainly it cannot be said that she was not aware of her forthcoming marriage and the change in

her marital condition and financial status at the time the decree was entered. Likewise it cannot be said that she was not aware of the fact that by agreeing to the custody provisions in the decree her visitation rights would have to be exercised at the defendant's home in Missouri. It appears from the record that no substantial change in circumstances involving the children has occurred since the divorce and certainly none has occurred that could not have reasonably been anticipated at the time the decree was entered. As was stated in the Maupin case:

> "It is the policy of courts of review to recognize a broad discretion in a chancellor called upon to award custody of children, and perhaps even greater discretion is allowed in altering visitation privileges. But this policy cannot properly admit that a definite award of custody (as distinguished from visitation privileges) has no permanence or finality whatever. Changes in permanent custody should not be subject either to constant or spasmodic variation, merely to follow fluctuations in the health, employment, or residence of the party last deprived of custody, where the order was not conditional with respect to such changes."

The decree granting the custody of children was res judicata as to the facts existing at the time of its entry and the evidence fails to show a material change in conditions affecting the welfare of the children since the entry of the decree. Nye v. Nye, 411 Ill. 408, 105 N.E. 2d 300.

For the reasons stated herein the order of the lower court will be affirmed.

Affirmed.

Carroll, P.J., and Reynolds, J., concur.

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